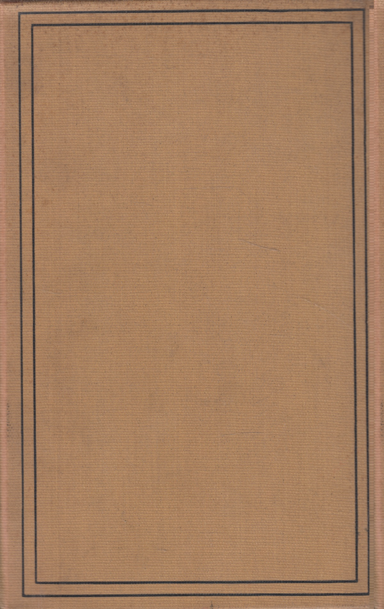








CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

JUNE 1, 1930, TO (IN PART) NOVEMBER 3, 1930

WITH

ABSTRACT OF DECISIONS OF THE SUPREME COURT IN COURT OF CLAIMS CASES

REPORTED BY

EWART W. HOBBS

VOLUME LXX

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1931



CONTENTS



JUDGES AND OFFICERS OF THE COURT

Chief Justice

Fenton W. Booth

Judges

William R. Green.
Benjamin H. Littleton.
Thomas S. Williams.
Richard S. Whaley.[1]

Auditors

Ewart W. Hobbs.
John K. M. Ewing.

Secretary

Walter H. Moling

Chief Clerk

J. Bradley Tanner.

Assistant Clerk

Fred C. Kleinschmidt.

Bailiff

J. J. Marcotte

Assistant Attorney General

(Charged with the defense of the Government)

Charles B. Rugg

[1] Appointed to succeed Judge Samuel J. Graham, resigned. Judge Whaley took the oath of office and entered upon his duties June 4, 1930.



COMMISSIONERS

(Act of February 24, 1925, 43 Stat. 964; act of January 11, 1928, 45 Stat. 51; act of June 23, 1930)

ISRAEL M. FOSTER, of Ohio.
JOHN M. LEWIS, of Indiana.
JOHN A. ELMORE, of Alabama.
MYRON M. COHEN, of Iowa.
HAYNER H. GORDON, of Ohio.
CARMEN A. NEWCOMB, Jr., of Missouri.
GUILFORD S. JAMESON, of Pennsylvania.



TABLE OF CASES REPORTED

NOTE.—For cases, dismissed by the Court of Claims, without opinion, pertaining to REFUND OF TAXES, or dismissed under authority of *Bew* v. *United States*, 68 C. Cls. 462, see pages 788, 789.



TABLE OF STATUTES CITED

STATUTES AT LARGE



CASES DECIDED

IN

THE COURT OF CLAIMS

JUNE 1, 1930, to (in part) NOVEMBER 3, 1930

A. D. CUMMINS & CO. v. THE UNITED STATES

[No. H-236. Decided April 7, 1930. Motion for new trial overruled December 1, 1930]

On the Proofs

Contracts; agreement to purchase; modification of terms; breach; retention of deposits.—Plaintiff entered into an agreement with the United States Shipping Board to purchase from the board two steel vessels, the plaintiff to have possession under an agency and operating arrangement until the sale was consummated, the sale to be made under the terms of a standard sales policy. Thereafter, and before the sale was made, the plaintiff asked and was granted a modification of the terms of the standard sales policy. Finding itself unable to carry out the terms of sale, as modified, plaintiff asked to be relieved from the contract to purchase, offering to return the vessels under certain conditions, which were not accepted. The vessels were returned without further agreement and the board refused to return to plaintiff deposits made in accord with the contract for purchase, retaining them as liquidated damages. The terms of the contract and the record reviewed, and *held* to preclude recovery of the deposits so retained.

Same; liquidated damages; penalty.—See *Hickey* v. *United States*, 65 C. Cls. 729.

Same; forfeiture of deposits; failure to resell.—Where an agreement to purchase is breached, and deposits made thereunder are forfeited as liquidated damages, the retention of the deposits without any attempt to dispose of the property in a reasonable time, is an indication that the vendor relinquished any claim to the difference between the purchase price and the market value at time of breach.

Reporter's Statement of the Case

Same; purchase of sailing vessels; construction of term "fittings."—Where the Emergency Fleet Corporation accepted a bid obligating the purchaser of certain sailing vessels to pay a stated price and in addition to pay for all fittings, "whether on the hulls, in the yards or elsewhere at the inventory appraised price," and the cost of installing the same on the hulls, the term "fittings" may not be extended to include items other than those essential to bring the hull to a bare-boat status.

Income tax; statute of limitations against United States; recovery on counterclaim.—Section 250 (d) of the revenue acts of 1918 and 1921, providing that no "suit or proceeding" for the collection of income taxes shall be "begun" after the expiration of five years after the return therefor, is a bar to recovery on a counterclaim for such taxes by the United States when such counterclaim was not filed within the statutory period.

The Reporter's statement of the case:

Mr. Frank E. Scott for the plaintiff.

Mr. Arthur Cobb, with whom was *Mr. Charles F. Kincheloe*, for the defendant.

The court made special findings of fact, as follows:

I. A. D. Cummins & Company, Inc., was incorporated under the laws of Delaware, July 1, 1918.

Prior to January 19, 1925, the said corporation had ceased to do business, and on or about said date its charter was repealed by the Governor of Delaware, pursuant to the provisions of sections 75 and 76, chapter 6, of the Revised Statutes of 1915 of Delaware, as amended, for nonpayment of taxes.

On March 26, 1928, the plaintiff filed in the office of the secretary of state of Delaware its certificate for the renewal and revival of its charter, in compliance with the provisions of section 73 of the general corporation law of said State, as amended, which authorizes the renewal, extension, and restoration of corporate charters, which act provided in part as follows:

"Such reinstatement shall validate all contracts, acts, matters, and things made, done, and performed within the scope of its charter by such corporation, its officers, and agents during the time when such charter was inoperative or void or after its expiration by limitation, with the same force and effect and to all intents and purposes as if said charter had at all times remained in full force and effect."

No assignment of the claim set out in the petition has been made and no action has been taken thereon in Congress or in any of the executive departments, except that the plaintiff presented the claim to the United States Shipping Board for adjustment and payment and said board refused to pay the claim or any part thereof.

II. The plaintiff and defendant, represented by the United States Shipping Board, hereafter referred to as the board, on or about March 5, 1920, entered into an agreement for the management and operation of vessels assigned to plaintiff, known as Form MO3. This agreement provided generally for such vessels as were assigned, to be operated and managed at the cost and for the account of the board, the managing operator to receive certain commissions and fees for his work.

A number of different vessels for varying periods were turned over to plaintiff, pursuant to the above agreement, for management and operation for the account of the board, and the United States Shipping Board Emergency Fleet Corporation, including the steamers *Westmount* and *Cascade*. Said Form MO3 appears at pages 14–20 of plaintiff's amended petition and is by reference hereby made a part of this finding.

III. During the month of May, 1920, and subsequently, plaintiff entered into negotiations with the United States Shipping Board, hereinafter termed the board, for the purchase of two steel vessels known as the *Westmount* and *Cascade*. At that time, the board had under consideration the terms, conditions, and prices of a new sales policy with respect to the vessels of the class of the *Westmount* and *Cascade*, and final determination thereon was dependent upon the passage by Congress of the merchant marine act of 1920, but said policy was not determined upon until on or about August 16, 1920.

Pursuant to the said negotiations, the plaintiff and the board entered into an agreement, dated May 29, 1920, by which the steamer *Westmount* was turned over to the plaintiff under the terms of said agreement. A copy of this agreement is attached to the amended petition, marked

"Exhibit A," and is by reference hereby made a part of this finding.

Following the above agreement, on or about July 21, 1920, the *Westmount* was duly turned over to plaintiff.

IV. The S. S. *Cascade* was turned over to plaintiff for management and operation, as indicated by the following three letters:

UNITED STATES SHIPPING BOARD,
Washington, July 21, 1920.

A. D. CUMMINS & Co., INC.,
135 South Fourth Street, Philadelphia, Pa.

DEAR SIR: Referring to your offer for the purchase of the S. S. *Cascade*, I beg to advise you that the board is not at this time prepared to make any sales under the provisions of the merchant marine act, 1920. This act requires advertisement and appraisal and sale with either public or private competition. We trust we will be able to announce shortly a definite sale plan so that offerings may be made.

However, in order to enable you to handle commitments and establish your service pending the consummation of the sales plan for our fleet, we will agree to assign to you under our agency agreement for the management and operation of steel cargo steamers the S. S. *Cascade* upon the express condition that you agree to purchase from the board, on the standard terms and conditions next established by the board, when the same shall have become possible, a steamer of approximately similar size, type, and class. Prior to making this assignment it will be necessary for you to deposit with the board a certified check to an amount equal to ten per centum of the purchase price of a vessel of this type computed on the present board prices, this price to be without prejudice to the price hereinafter to be set by the board. It is, however, understood that your company shall have the benefit of similar and equal treatment accorded to all future purchases of ships from the board on said standard terms and conditions. It is further expressly understood that the amount so deposited shall be held by the board as a guarantee of your purchasing a vessel of the above type; and in the event you shall fail within ten days to purchase a vessel of said type after the adoption of said standard terms and conditions and a merchantable vessel of that type has become available and notice of that fact has been given by the board, this sum shall be retained by the board as liquidated damages to cover the expenses and other charges in connection with making assignment of this

vessel and preparing for the sale. In the event it is impossible for the board to make the sale, the foregoing amount will be returned to you by the board.

Upon the sale being made it shall become retroactive to the date of delivery of the vessel and the agency agreement shall be null and void and all operating revenues received by the purchaser shall be credited to his account and all disbursements made under the agency agreement shall be charged to him, all subject to the provisions of the said sales plan.

It is further agreed that in the event the purchase is not made within the time specified the board may immediately withdraw the vessel from assignment. It is further specifically agreed that neither this assignment nor the acceptance of the deposit hereinbefore referred to shall in any way constitute an option for the purchase of the foregoing vessel.

Very truly yours,

J. HARRY PHILBIN.

DIVISION OF OPERATIONS,
UNITED STATES SHIPPING BOARD
EMERGENCY FLEET CORPORATION,
802 Chestnut Street, Philadelphia, Pa., July 26, 1920.

Subject: *Cascade*,

A. D. CUMMINS & Co.,
Bullitt Bldg., Philadelphia, Pa.

GENTLEMEN: The following telegram, Number BZ 3493, dated July 24, 1920, was received by this office from Washington:

"*Cascade* assigned A. D. Cummins & Co., Inc., managing agent, pending adoption by board of new purchase plan. Withdraw managing agency vessel.

"DUVAL & Co."

The above is your authority to take the necessary action. Kindly acknowledge receipt of this letter.

Yours very truly,

WM. A. SILVER,
Manager Traffic Dept.
By S. L. REIFF,
Head Contract Section.

Reporter's Statement of the Case

A. D. CUMMINS & Co., INC.,
SHIP BROKERS AND VESSEL AGENTS,
Bullitt Building, 135 South Fourth Street,
Philadelphia, Pa., July 27, 1920.

WM. A. SILVER,
Manager Traffic Department, U. S. Shipping Board,
802 Chestnut Street, Philadelphia, Pa.

(S. S. *Cascade*, attention S. L. Reiff.)

DEAR SIR: We thank you for your favor of the 26th advising us that this steamer has been assigned to us as managing agent pending the adoption by the board of the new purchase plan. This is in accordance with our understanding and we will be governed accordingly.

Yours very truly,

A. D. CUMMINS & Co., INC.

V. On August 16, 1920, the board adopted its standard ship sales policy, a copy of which was sent to plaintiff on or about August 16, 1920. The terms of this announcement and advertisement for bids are set out as "Annex III" in the defendant's counterclaim, and are by reference hereby made a part of this finding.

VI. In relation to the proposed purchase of the S. S. *Cascade* the board wrote plaintiff under date of September 3, 1920, as follows:

UNITED STATES SHIPPING BOARD,
September 3, 1920.

A. D. CUMMINS & Co.,
135 South Fourth Street, Philadelphia, Pa.

GENTLEMEN: Under date of August 16, the board announced its policy for the sale of new steel tonnage pursuant to authority conferred upon it by the merchant marine act, 1920, and there is attached hereto copy of the announcement.

Vessels are now being advertised and the board is in position to accept offers; therefore, in accordance with the terms of your contract by which the steamship *Cascade* was assigned to you pending the adoption of a sale policy you are requested to submit a proposal for the purchase of either the *Cascade* or a ship of similar type and tonnage. Complete information as to prices and terms are given in the announcement. All vessels are offered "as is," the board reserving the right to designate port of delivery.

There are attached forms for use in submitting your offer and you will please make out forms in all details.

Please submit your offer promptly so that the transaction may be closed within the time specified after formal notification to you, namely, ten days.

Yours very truly,

J. HARRY PHILBIN.

In reply to that letter the plaintiff addressed two letters to the board, both under date of September 9, 1920, as follows:

A. D. CUMMINS & CO., INC.,
SHIP BROKERS AND VESSEL AGENTS,
Bullitt Building, 135 South Fourth Street,
Philadelphia, September 9, 1920.

UNITED STATES SHIPPING BOARD,
Ship Sales Division, Washington, D. C.

DEAR SIRS: Fulfilling our agreement to purchase the steamship *Cascade* under the terms of the new ship sales plan, we hereby offer $1,303,500 for this vessel, and accept delivery at Philadelphia where she now lies.

At the time of making this agreement we deposited $36,032 and herewith enclose certified check for $94,317.98, being the balance of 10% payment, with the understanding that the balance of payment be made as per the credit conditions of the new ship sales plan.

One register of the Shipping Board vessels gives this vessel's dead weight as 7,415 tons; another gives it as 7,562 tons. We, of course, want the lower capacity in paying for same, but do not know which is correct, and therefore can not make a definite stand, but trust you will allow the lower tonnage in confirming this sale.

The *Cascade* is now ready to be taken over, and we trust you will confirm this sale to-day.

Yours very truly,

A. D. CUMMINS & CO., INC.,
A. D. CUMMINS, *President.*

A. D. CUMMINS & CO., INC.,
135 South Fourth Street,
Philadelphia, Pa., September 9, 1920.

J. HARRY PHILBIN,
Ship Sales Division, U. S. Shipping Board,
Washington, D. C.

DEAR SIR: In fulfilling our agreement to purchase the S. S. *Westmount*, under the terms of the new ship sales plan, we hereby offer $1,416,283 for said vessel. At the time of

making proposal we paid $38,847 on account. She was sold to us with class confirmed, and in order to secure the class it was necessary to put on a new stern frame, as the present one is cracked and welded. Lloyds allowed us to make one trip with the present frame, with the understanding that a new frame be ordered at once and be put on when she returns. A contract for same was made by the Shipping Board at New York, and a reduction of $30,096.89 for contract and detention was made from the payment of 10% when we took the vessel over, with the understanding that we carry out the terms of their contract and make payment for same, which we agreed to do.

At the time of taking the vessel over on the M03 agreement we paid to the Shipping Board $85,404.10, which with this offer gives us a credit of $12,797.27. Our figures are based on cost of $175 per ton, less depreciation, less what we have paid, and also allowance for the stern frame.

In making this offer, it is understood the sale is to date from July 20, 1920, at which time we accepted the vessel, and all profits and expenses thereafter are to be for our account.

Please let us have confirmation of this sale as soon as possible, when we will at once arrange insurance.

Yours very truly,

A. D. CUMMINS & Co., INC.,
A. D. CUMMINS, *President*.

VII. About the time of the delivery of the *Westmount* and *Cascade* to the plaintiff, there was deposited with the board by the plaintiff the sum of $141,552.78 on account of the proposed purchase of the *Westmount* and the sum of $130,-349.98 on account of the proposed purchase of the *Cascade*, making in all $271,902.76, no part of which has been returned.

VIII. On August 24, 1920, the plaintiff advised the board in writing that it had borrowed certain sums from banks to finance its operations; that the provisions of the standard sales policy of the board with respect to a controlled account of the revenues received from operation of the vessels precluded it from making payments on its financial obligations, and that unless some satisfactory arrangements could be made to modify these provisions it would be compelled to decline to go through with the contract of purchase. Later the plaintiff on September 1, 1920, conferred with officials of the board in Washington upon the same subject. The communication set out below followed:

Reporter's Statement of the Case

UNITED STATES SHIPPING BOARD,
September 3, 1920.

A. D. CUMMINS & Co., INC.,
135 South Fourth Street, Philadelphia, Pa.

GENTLEMEN: Referring to your letter of September 1, requesting confirmation of your conversation with Commissioner Donald with reference to the *Westmount* and *Cascade:*

This matter was presented to the board to-day and advice given to you by Commissioner Donald was confirmed, i. e.—

"That the board would consider the withdrawal of the controlled account, if Mr. Cummins would agree to put the vessels in separate companies and have the notes covering the balance of the purchase price properly endorsed by both members of your company."

Yours very truly,

J. HARRY PHILBIN.

IX. During October, 1920, the plaintiff and the board exchanged the two following communications:

[Telegram]

OCTOBER 15, 1920.

Westmount, Cascade.
To A. D. CUMMINS & Co.,
135 South Fourth Street, Philadelphia, Pa.:

Advise immediately by wire names of officers designated to sign note covering deferred payments in accordance with arrangement for withdrawal of controlled account. Camakay. Unless certified check for four hundred dollars received to-morrow morning, will be necessary to disregard offer.

PHILBIN, *Ship Sales.*

A. D. CUMMINS & Co., INC.,
SHIP BROKERS AND VESSEL AGENTS,
Bullitt Building, 135 South Fourth Street,
Philadelphia, October 18, 1920.

SHIP SALES DEPARTMENT,
U. S. Shipping Board, Washington, D. C.
(Attention Mr. Philbin.)

DEAR SIR: Your wire of the 15th reached the writer this morning, as he has been out of town since Friday.

We organized separate companies for the two steamers—Westmount Steamship Co. and Cascade Steamship Co., and officers of the same being A. D. Cummins, president; F. J. McDonald, treasurer; and Harlan E. Goodell, secretary.

The notes covering the deferred payments will be signed by the president or treasurer, or both, if you wish.

Yours very truly,

A. D. CUMMINS & CO., INC.

X. In response to plaintiff's offer to purchase the said vessels, on or about November 23, 1920, plaintiff received the following letter from the board, together with the enclosures therein mentioned:

UNITED STATES SHIPPING BOARD,
November 23, 1920.

A. D. CUMMINS & CO.,
135 South Fourth Street, Philadelphia, Pa.

GENTLEMEN: I am transmitting herewith purchase agreements in duplicate, mortgages and two series of promissory notes covering sale of the S. S. *Cascade* and *Westmount* to the Cascade and Westmount Steamship Companies.

I would request that you have the officers of the respective companies execute the purchase agreements, mortgages, and notes, returning same to this office. The board in granting your request for release from the controlled account and sinking-fund provisions in the standard form of contract stated that this would be permitted provided the A. D. Cummins Company would endorse the notes covering the deferred payments. I would therefore request that your company endorse the notes to be given by the Cascade and Westmount Steamship Companies.

Upon return of these documents to this office, the mortgages, together with the bills of sale, will be forwarded to the collector of customs at Philadelphia for recording. I would also request that you advise me when these vessels will be in port, that I may make arrangements to have the preferred mortgages endorsed on the vessels' documents.

I also wish to call your attention to the fact that documentary stamps to the amount of two cents per hundred dollars should be attached to all of the enclosed promissory notes.

Very truly yours,

W. W. NOTTINGHAM,
Asst. Counsel.

The above letter of November 23, 1920, was received by plaintiff and contained as enclosures a proposed "agreement of sale," a "preferred mortgage," and a series of promissory

notes, all made out in the name of and to be signed by the "Westmount Steamship Company," and a similar set of papers made out in the name of and to be signed by the "Cascade Steamship Company."

XI. At the time these negotiations were undertaken, plaintiff had been offered by the Russian Volunteer Fleet, for transportation to Russia, approximately 20,000 tons of shrapnel and 10,000 tons of railroad material, and the Department of State had issued a permit for the shipment of this material. During the course of negotiations plaintiff advised various representatives of the board, with whom it was dealing, that the purchase of the steamships *Westmount* and *Cascade* was desired especially to enable the plaintiff to transport the above-mentioned material, contract for which it had in the meantime accepted. After 3,500 tons of the above-mentioned material had been loaded for shipment, the State Department forbade clearance from American ports of any vessel carrying munitions to Russia, following which the contract for the carriage of such material was canceled and the Russian Volunteer Fleet, in consideration of such cancellation, paid plaintiff the sum of $75,000, which appears as a credit to defendant in the board statement of account rendered November 1, 1924.

XII. Plaintiff requested permission of the board to withdraw from the negotiations and return the vessels to the board, as appears in the following letter:

DECEMBER 13, 1920.

UNITED STATES SHIPPING BOARD,
Washington, D. C.

DEAR SIRS: We respectfully request that we be permitted to return the steamships *Westmount* and *Cascade* to the board and be relieved from our agreement to purchase the vessels, as we find it impossible for us to meet the payments and keep the vessels free of debt.

The monies used to make the initial payments were borrowed, and there has been so much publicity about the low rates, high expenses, and failures in the steamship business the banks are calling in their loans, and with insurance premiums due within the next five days, and, also, other large bills on the vessels, it makes it necessary for us to make this request.

We make this request with the provision that we turn the vessels back, free from all operating debts, the accounts to be audited, the board to have any profits earned, and should there be any loss in operation we to pay the same.

On account of bills which will be due within a few days, we trust our request will receive prompt and favorable attention.

We have been managing and operating Shipping Board ships for two years, and would be very glad to have these allocated to us on the M. O. agreement.

Very truly yours,

A. D. CUMMINS & Co., INC.,
A. D. CUMMINS, *Pres.*

The board replied December 28, 1920, to the foregoing letter by offering relief from the contract to purchase, upon the conditions that all revenues received from the operation of the vessels were to be credited to the board, and if the net profits derived from the vessels equaled the sum of the amounts deposited as a guaranty for performance of the sales contract, relief would be granted, especially stating that in no event would relief be granted if the net profits were less than the deposited sums. The plaintiff on December 31, 1920, declined to accept this offer, adhering to its original proposition to return the vessels to the board free from any claims of profits or commissions due it under the MO3 contract. On January 28, 1921, the board answered the above letter by stating that the matter must await further action of the board.

On January 25, 1921, the board adopted the following resolutions:

["Extract from proceedings of the United States Shipping Board]

"JANUARY 25, 1921.

"Whereas A. D. Cummins & Company, Inc., of Philadelphia, agreed to purchase the S. S. *Westmount* and the S. S. *Cascade*, but have never executed contract for the purchase of the said vessels; and

"Whereas the S. S. *Westmount* and the S. S. *Cascade* have been operated by said A. D. Cummins & Company, Inc., under the managing agency agreement for the account of the board since the date of delivery of said vessels to the said company under action taken by the board on December 23, 1920; and

"Whereas under date of December 31, 1920, the said A. D. Cummins & Company, Inc., stated that it is impossible for them to comply with the conditions of such action by the board on December 23, 1920; and

"*Resolved*, That A. D. Cummins & Company, Inc., be directed to return the S. S. *Westmount* and S. S. *Cascade* to a United States port as soon as practicable; and

"*Further resolved*, That the general comptroller and the treasurer of the United States Shipping Board Emergency Fleet Corporation be, and they are hereby, respectively authorized and directed to approve for payment and to pay outstanding disbursements on said vessels in excess of operating revenues received by said A. D. Cummins & Company, Inc., in order that said vessels may be returned to a United States port; and

"*Further resolved*, That upon the arrival of each of said vessels at a United States port the general comptroller be, and he is hereby, directed to make an audit of the accounts of said A. D. Cummins & Company, Inc., covering the operation of the said vessels, reporting results thereof to the board for such action as it may deem advisable in the premises."

A. D. CUMMINS & CO., INC.,
SHIP BROKERS AND VESSEL AGENTS,
Bullitt Building, 135 South Fourth Street,
Philadelphia, January 29, 1921.

SHIP SALES DEPARTMENT,
U. S. Shipping Board, Washington, D. C.
(Attention Mr. Philbin.)

GENTLEMEN: Thanks very much for your favor of the 28th inst., advising us of the board's action as regards the S. S.'s *Westmount* and *Cascade*, and will certainly do our part toward following instructions which they may have to give us.

If you should happen to have a spare copy of the resolution, will you please send it to us?

Yours very truly,

A. D. CUMMINS & CO., INC.,
A. D. CUMMINS, *Pres.*

XIII. Pursuant to the above, the board wrote the following letter, in accordance with which the *Westmount* and *Cascade* were redelivered to the board on the dates and at the places therein mentioned:

UNITED STATES SHIPPING BOARD,
EMERGENCY FLEET CORPORATION,
Philadelphia, Pa., January 3, 1922.

Subject: S. S. *Cascade* and *Westmount.*
Messrs. A. D. CUMMINS & Co.,
Bullitt Building, Philadelphia, Pa.
(Attention Mr. A. D. Cummins, president.)

We quote below letter received from Mr. U. J. Gendron, assistant manager, contract division, Washington, which is self-explanatory:

"Referring to certificates dated December 13, 1921, covering permanent withdrawal of the above-named steamers from A. D. Cummins & Co., Inc., as managing agents pending sale, we have conferred with our legal division, who advise us that these certificates are not required, in view of the fact that both of these vessels were temporarily redelivered under dates of March 21, 1921, at Philadelphia, on the S. S. *Cascade* and February 12, 1921, at Boston, on the S. S. *Westmount.*

"We are, therefore, arranging to note on these old certificates that permanent redelivery was made to the board on the *Cascade* on December 13, 5.00 p. m., Philadelphia, and on the *Westmount*, December 13, 1921, midnight, Boston."

You will please be governed accordingly.

Yours truly,

H. C. HIGGINS, *District Agent.*

XIV. Soon thereafter there was correspondence between the plaintiff and the board as to an accounting respecting the $271,902.76 which had been deposited with the board, and the following letters were exchanged:

A. D. CUMMINS & Co., INC.,
SHIP BROKERS AND VESSEL AGENTS,
Bullitt Building, 135 South Fourth Street,
Philadelphia, June 6, 1921.

Admiral W. S. BENSON,
Chairman U. S. Shipping Board,
Washington, D. C.

DEAR SIR: We desire to invite your attention to a resolution passed by the board under which S. S. *Westmount* and *Cascade* were allotted to our company for management and operation.

Certain monies were deposited with your company at the time of the assignment of these ships to us, to be used in the purchase, and, inasmuch as this purchase was not consummated, we now request that same be returned to us at the

earliest practical date, as we are now informed that the comptroller's department has made a thorough investigation relative to the operation and managing accounts of these ships which were returned to the board some months ago. The money was borrowed by us in anticipation of the probability of the purchase of the ships, and we are asked for an immediate return of same.

We understood that the matter was being deferred awaiting an appropriation by Congress, and, in the meantime, would request that $100,000 of this money be paid to us on account and the balance be paid at as early a date as practical, as we are placed in a position where there is no other alternative and we, therefore, ask you give this your immediate and favorable consideration.

Yours very truly,

A. D. CUMMINS & Co., INC.,
A. D. CUMMINS, *Pres.*

UNITED STATES SHIPPING BOARD,
EMERGENCY FLEET CORPORATION,
June 9, 1921.

A. D. CUMMINS & Co., INC.,
135 South Fourth Street, Philadelphia, Pa.

GENTLEMEN: I have your letter of June 6, wherein you outline your aspect of the situation concerning the steamships *Westmount* and *Cascade.*

From the statements made in your letter, you appear to be under a misapprehension as to the terms of the transactions involving these two ships. By again referring to your records, you will undoubtedly find that these two vessels were distinctly sold to you; that they were delivered to you for management and operation, pending the adoption of the sales plan which was then under consideration; and that you unequivocally agreed to purchase these ships under the terms of the said sale plan when it was announced, said agreement by you having been guaranteed by depositing with the board 10 per cent of the respective sales values of the vessels.

Upon submitting to you for execution the final documents covering these sales, your corporation petitioned the board to permit you to withdraw from your obligation to consummate this sale. In said petition you agreed to turn over to the board any operating profits derived as a result of their then existing commitments, and you agreed to assume any loss thereby if any was incurred; in substance your firm agreeing to redeliver the boats to the board free and clear

of any liens or encumbrances, if the board was so disposed. After considering the foregoing petition, the board directed the general comptroller to prepare a financial-operating statement indicating the results of the operation of these vessels by you, the board withholding any further action on the matter pending the receipt of such report.

The general comptroller recently completed the preparation of such a report and it is now before the board for consideration. When any action has been taken by the board on your petition, in conjunction with said statement, you will be promptly advised.

Very truly yours,

W. S. BENSON, *Chairman.*

XV. On or about October 4, 1921, the board's audit of the account had been partially completed, and the application of the plaintiff for the refund of its monies was referred to the general counsel of the board for an opinion. On October 18, 1921, the general counsel rendered his opinion, as follows:

OCTOBER 18, 1921.

From: Elmer Schlesinger, general counsel.
To: H. S. Kimball, vice president.
Subject: Application of A. D. Cummins & Co., Inc., for refund of money, account of steamers *Westmount* and *Cascade.*

Pursuant to your letter of October 4, 1921, with reference to the above matter, I have examined the facts in the cases of the S. S. *Westmount* and S. S. *Cascade*, and find the situation as follows:

A. D. Cummins & Co., Inc., agreed to purchase these vessels and execute the contract of sale, mortgages, and notes, and that pending such time they agreed to operate these vessels as managing agents. Contracts of sale and other necessary papers were duly tendered this concern and were never executed by them. Their failure to execute those documents was a breach of their agreement to purchase, and the Shipping Board must retain the partial payments made on account of the purchase price of each of the said vessels as liquidated damages.

In view of the fact that the contract of sale was not consummated, A. D. Cummins & Co., Inc., held these vessels as managing agents, and the Shipping Board, therefore, must audit the accounts of these vessels in accordance with the terms of the MO3 agreement.

The Shipping Board can not concern itself as to the reason why A. D. Cummins & Co. were unable to comply with

their agreement and execute the contracts of sale. The Shipping Board is not liable for the action taken by the State Department.

It is well settled that the Shipping Board is without authority to relinquish a legal right unless there exists a valid consideration therefor. No such consideration exists in the present cases, and the Shipping Board can not return the partial payments made by this concern.

(Sgnd.) ELMER SCHLESINGER,
General Counsel.

XVI. On November 15, 1921, the board took action on the application of the plaintiff for the return of the said vessels and for the refund of the monies deposited as aforesaid, which action is set forth in a resolution as follows:

[Extracts from proceedings of the United States Shipping Board Emergency Fleet Corporation.]

"NOVEMBER 15, 1921.

"The petition filed by A. D. Cummins & Company for refund of $241,805.87, deposited by them in connection with the purchase of the steamships *Westmount* and *Cascade*, together with memorandum from the legal department in connection therewith, to the effect that the Shipping Board was not liable for action taken by the State Department in refusing to issue necessary permissions to A. D. Cummins & Company; that the Shipping Board had no authority to relinquish a legal right unless a valid consideration existed therefor; that no valid consideration existed in the present case, and that the deposits made could therefore not be returned as requested, was considered, and on motion of Vice President Kimball, seconded by Vice President Schlesinger and duly carried, the board of trustees determined that the petition should be denied, and that the deposits heretofore made by said A. D. Cummins & Company on account of the purchase of the steamships *Westmount* and *Cascade* should be retained."

XVII. On October 1, 1920, the plaintiff as principal and the Aetna Casualty & Surety Company, of Hartford, Connecticut, as surety, entered into an agrement with the board by which plaintiff and the surety company covenanted to answer to the board in a penal sum not to exceed $250,000, conditioned upon saving the board harmless on account of the management and operation of said vessels by the plaintiff—the bond reciting, "Whereas the United States Shipping Board Emergency Fleet Corporation has entered into

an agreement with A. D. Cummins & Company, Inc., for the operating and/or managing of certain vessels heretofore or hereafter assigned to said A. D. Cummins & Company, Inc., as manager and/or operator." On or about November 1, 1924, the board having completed its audit of the account with plaintiff, forwarded said statement of account to the plaintiff, and to the surety above named. The account as forwarded to the surety company was accompanied by the following letter:

UNITED STATES SHIPPING BOARD,
EMERGENCY FLEET CORPORATION,
AGENT OF UNITED STATES SHIPPING BOARD,
Washington, D. C., November 1, 1924.

Re A. D. Cummins & Company.
THE AETNA CASUALTY & SURETY COMPANY,
Hartford, Connecticut.

GENTLEMEN: On May 26, 1924, I wrote you as follows:
"Under date of November 1, 1920, you executed as surety for A. D. Cummins & Company a bond in the penal sum of $250,000, conditioned upon the performance of the agreement of the United States of America, represented by the United States Shipping Board, acting through the United States Shipping Board Emergency Fleet Corporation with A. D. Cummins & Company, Inc., for the operation and/or managing of certain vessels theretofore or thereafter assigned to said company.

"This is to advise you that on audit of the account of A. D. Cummins & Company, recently made, shows a loss to the United States of approximately $236,631.31. Demand is hereby made upon your corporation for the above sum, and you are hereby tendered the assistance of this office, together with every facility for ascertaining the nature of the loss."

I am sending you herewith a copy of the revised audit and statement of our claim under the above-mentioned bond. Such revised statement shows that the indebtedness of the A. D. Cummins & Company, for which your company is liable under the said bond, is $134,523.73.

Demand is hereby made upon you for the said sum of $134,523.73, and we will render every reasonable assistance, and afford you every opportunity to make such investigations of this claim as you may desire.

Very truly yours,

CHANCEY G. PARKER,
General Counsel.

Extracts from the books of the board relating to these ships contain under "Remarks" the notation: "Allocated under MO3."

XVIII. It is stipulated that, after eliminating errors, a correct summary of the account under the MO3 agreement is as follows:

	Revenues	Disbursements and credits
S. S. Westmount operating account	$256, 528. 86	$197, 696. 28
Agency fees		6, 064. 68
S. S. Cascade operating account	132, 614. 95	107, 162. 48
Agency fees		5, 028. 88
Other items—on account of disallowed items of expense—as per stipulation	11, 908. 68	
		315, 952. 32
Balance in favor of board under managing and operating agreement		85, 100. 17
Total	401, 052. 49	401, 052. 49

The foregoing debit of $85,100.17, when deducted from the $271,902.76 deposited with the board by the plaintiff, leaves the balance of $186,802.59 for the recovery of which this suit was filed.

XIX. The defendant's first counterclaim rests on its contention that the negotiations hereinbefore set out constituted a contract, and that plaintiff is liable in damages for its breach.

As one item of such damages, defendant claims credit for certain monies expended by direction of the board, which expenditures were made by the board directly and did not pass through plaintiff's hands. The details are stipulated as follows:

"The United States Shipping Board Emergency Fleet Corporation expended by direction of the board on account of obligations incurred against the S. S. *Westmount*, while the vessel was in possession of plaintiff, the sum of $80,-934.87, and on account of obligations incurred against the S. S. *Cascade*, while the vessel was in possession of plaintiff, the sum of $113,626.72; the details of the expenditures mentioned appear respectively in the schedules appended hereto as Annex IV and Annex V; the plaintiff, while admitting the expenditure of the sums mentioned, does not

admit the propriety of any one of the several expenditures and specifically denies any liability or responsibility therefor or for the total amount of such sum."

The foregoing expenditures formed no part of the accounting as rendered by the board to the plaintiff or its surety on November 1, 1924. If the MO3 agreement is the proper basis of an accounting, said expenditures form no basis for a claim against the plaintiff.

There was no American market for vessels of the type of the *Westmount* and *Cascade* other than the Shipping Board's prices, in July, 1920, which was $175 per ton. The foreign market at this time was 26 pounds and the rate of exchange was approximately $3.95 to the pound.

Between September, 1920, and December, 1921, there was a continuous decline in the open market of vessels of the type in question, so that in December, 1921, the world market price had declined to $33 per ton, and the American market of vessels other than Shipping Board vessels was $35 per ton. During the period mentioned the Shipping Board vessels, including the *Westmount* and *Cascade*, were not held subject to sale at the prevailing prices.

No statement of acccount was rendered or demand made upon plaintiff prior to the institution of this suit for any item of damages based upon the loss in value of the ships or the aforementioned expenditures made by said board.

XX. Defendant's second counterclaim is for certain additional income taxes for the calendar years 1918 and 1919, in the sums of $5,873.22 for 1918 and $1,278.56 for 1919, as set out in Paragraph XIV of its counterclaim. In support of this second counterclaim the defendant's counsel offered in proof certified copies of certain documents which showed:

As to the year 1918—

On June 16, 1919, plaintiff filed its income-tax return for the period June 1, 1918, to December 31, 1918.

On October 16, 1923, the Commissioner of Internal Revenue assessed plaintiff an additional $5,873.22 for said period of 1918.

As to the year 1919—

On March 15, 1920, plaintiff filed its income-tax return for the year 1919.

On June 25, 1925, the Commissioner of Internal Revenue made an additional assessment against plaintiff for the year 1919 in the amount of $1,278.56.

No part of the foregoing additional assessments have been collected and no suit had been instituted for such collection prior to the institution by plaintiff of this action.

XXI. Defendant presents a third counterclaim for the sum of $51,758.41 based upon the following transactions:

On or about November 20, 1919, the United States Shipping Board Emergency Fleet Corporation offered for sale 116 steamship hulls, 5 sailing vessels, and 61 converted barges, all of wood construction. This advertisement for bids is set out on page 52 of the defendant's counterclaim. On or about November 20, 1919, the plaintiff wrote the Emergency Fleet Corporation making an offer for the two (2) Kirby sailing vessels mentioned in the advertisement, which offer is set out on page 54 of the counterclaim, and which is in part as follows:

"We hereby tender you an offer for the two (2) Kirby schooners now building at Beaumont, Texas, at $21.40 per dead-weight ton, as per your advertisement of November 18th, copy of which is herewith attached, and enclose in part payment thereof a certified check for $50,000 with the understanding that the balance of payment be made on actual delivery of the vessels.

"We will also purchase all of the fittings for these two vessels located at Beaumont and ready at the inventory appraised price and pay for installation of same on said hulls."

On November 22, 1919, plaintiff amended its offer by changing the price to the lump sum of $42,800 for each of the two vessels instead of $21.40 per ton. Plaintiff's offer was accepted by the said Emergency Fleet Corporation, on November 22, 1919, as per letter set out on page 56 of the counterclaim.

The price of $42,800 per vessel was paid, the vessels delivered, and no dispute arose in that connection. The defendant's counterclaim is based upon a claim for certain materials and supplies alleged to have been used for the completion of the vessels. It is claimed by defendant that plaintiff's liability therefor arises from the terms of the

agreement requiring plaintiff to pay for all "fittings" for the two vessels.

A dispute as to plaintiff's liability for these "fittings" arose at the time, and in order that plaintiff might obtain possession of the vessels the following bond was executed under date of May 3, 1920.

Know all men by these presents

That we, A. D. Cummins & Company, Inc., a corporation incorporated and existing under the laws of the State of Delaware, as principal, and National Surety Company, a corporation incorporated and existing under the laws of the State of New York, as surety, are held and firmly bound unto the Emergency Fleet Corporation in the sum of thirty thousand dollars ($30,000) lawful money of the United States of America to be paid to the Emergency Fleet Corporation, for which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 3rd day of May, A. D. 1920.

Whereas the said A. D. Cummins & Co., Inc., has purchased from the said Emergency Fleet Corporation two schooners named, respectively, *Albert D. Cummins* and *Marie F. Cummins;* and

Whereas there is a balance of moneys due by the said A. D. Cummins & Co., Inc., to the said Emergency Fleet Corporation in payment of materials and supplies used and to be used in completion of the said schooners; and

Whereas the exact amount of money so due for said material and supplies has not yet been determined but is now actually in process of being determined; and

Whereas the said schooner *Albert D. Cummins* is now fully completed and ready to sail from Beaumont, Texas, the port of construction, and the said purchaser is desirous of securing title to and possession of the said schooner *Albert D. Cummins* without further delay, and without waiting the final determination of the said amount of money so due upon both the said vessels, and the sellers also desire to make title to and deliver possession of the said schooner *Albert D. Cummins* to the said purchaser.

Now the condition of the above obligation is such that if the above bounden A. D. Cummins & Co., Inc., do and shall well and truly pay or cause to be paid unto the said Emergency Fleet Corporation, its successors and assigns, the

Reporter's Statement of the Case

amount of the moneys so due for the aforesaid materials and supplies up to but not in excess of $30,000 within 30 days after the bills for the said moneys have been presented to the said A. D. Cummins & Co., Inc., by the said Emergency Fleet Corporation, and have been found to be correct, then this obligation to be void, otherwise to remain in full force and virtue.

A. D. CUMMINS & COMPANY, INC.,
By A. D. CUMMINS, *Pres.*

Attest:

H. E. GOODELL, *Sec'y.*

[SEAL.] NATIONAL SURETY COMPANY, *Principal,*
By CHAS. LLOYD, *Res. Vice Pres.*

Attest:

MARY A. HEYLIN,
Res. Asst. Sec.

Also a bond dated June 16, 1920, was given by plaintiff in respect to the schooner *Marie F. Cummins*, which bond was similar to the above except it was in the amount of $25,000.

Prior to the institution of this suit no itemized statement of claim or any bill was rendered to plaintiff as to what items constituted a proper claim for an amount due under these bonds, and no suit or other proceeding for collection on the bonds had been commenced. However, after this suit was filed and under date of April 10, 1928, an itemized statement of an account presenting the claim for $51,758.41 was mailed to and received by plaintiff, which statement appears as plaintiff's Exhibit X.

The work on a ship during its construction may be considered under six main divisions: (1) Hull; (2) woodwork, such as floors, cabins, etc.; (3) fittings; (4) outfit and furnishings; (5) auxiliary machinery, consisting of piping and electric systems, and ventilation; (6) propelling machinery. In the itemized claim, forwarded to plaintiff on April 10, 1928 (defendant's Exhibit X), the materials and supplies which answer to the term "fittings" in the foregoing subdivisions consist of a series of items which are indicated thereon by a red pencil mark. They amount in aggregate to $4,130.42.

The court decided that plaintiff was not entitled to recover. Judgment on counterclaim, $89,230.59.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff sues to recover a judgment for $182,672.17. The defendant interposes three counterclaims. The case is the result of contracts to purchase two steel vessels entered into by the plaintiff with the Shipping Board. The plaintiff and the board on March 5, 1920, executed what is known as an agency agreement for managing and operating steel cargo vessels. This instrument was a general agency agreement and did not specify particular vessels to be delivered to the plaintiff under it. In May, 1920, the plaintiff inaugurated negotiations for the purchase of two steel cargo vessels, viz, the *Westmount* and the *Cascade*. The board was willing to sell the vessels, but the terms of the sale could not be then definitely fixed, the board having at the time under consideration its general sales policy in accord with the merchant marine act of 1920. The parties, in view of this situation, entered into the contract of May 29, 1920. This contract provided for the coming into existence of two relationships. The board was to deliver the two vessels to the plaintiff to be managed and operated under the terms of the general operating contract of March 5, 1920—identified as the MO3 contract—and in addition the plaintiff agreed to buy and the board to sell the two vessels under terms and conditions thereafter to be adopted by the board as its standardized sales policy, the plaintiff expressly agreeing to execute and deliver to the board a contract for the purchase of the vessels within 10 days after the receipt of this final contract. It was in accord with this contract for the purchase of the *Westmount*, and the subsequent contract consummated by written letters for the purchase of the *Cascade*, that the plaintiff deposited with the board the total sum of $271,902.76 as a guaranty for entering into the final contracts of sale as per the terms of the agreement of May 29, 1920, the contract providing that in the event of the failure of the plaintiff to comply with the same the deposited sums should be retained by the board as liquidated damages, and

it is for this sum, less certain credits admittedly due the board, that this suit is brought.

On August 16, 1920, the board announced its standard sales policy for the sale of steel cargo vessels which included, of course, the *Westmount* and *Cascade*. Among other provisions the standard sales policy of the board required the appraisal and advertisement for sale of vessels coming within its terms. Bids were to be received and the sales finally consummated upon the express terms therein stated. As an assured security for deferred payments the purchasers were to deposit all revenue derived from the operation of the vessels in an account under the control and supervision of the board, until the deferred payments had been met to the extent of 50% of the purchase price. After this time, with certain other privileges granted the purchaser not important herein, the purchaser was to execute a preferred mortgage for the remaining sums due, and revenues from operation were to be released from the controlled account.

On September 9, 1920, the plaintiff submitted its bids for the two vessels involved, viz, $1,303,500 for the *Cascade* and $1,416,283 for the *Westmount*. In the letter submitting plaintiff's bid for the *Westmount* attention was directed to a surplus due the plaintiff from the sums deposited under the May 29, 1920, contract arising from the difference between the purchase price tentatively agreed upon in that contract and the purchase price fixed by the standard sales policy of the board. The board, in order to return the surplus and relieve the plaintiff from the provisions of the controlled account of revenues derived from operations which were seriously embarrassing the plaintiff financially, as noted in plaintiff's letter of August 24, 1920, agreed to release the controlled account, upon the express condition that the plaintiff would organize two separate corporations for the operation of the two vessels and have the notes for their purchase price indorsed by the plaintiff. This was finally accomplished as the board directed. Two separate corporations, one the Westmount Steamship Company and the other the Cascade Steamship Company, were organized and incorporated.

On November 23, 1920, the board forwarded to the plaintiff purchase agreements in duplicate, accompanied by mortgages and two series of promissory notes covering the purchase price of the two vessels. The plaintiff received, but never did sign, the agreements or execute the securities. On the contrary, December 13, 1920, the plaintiff asked to be relieved from the contract of May 29, 1920, offering at the same time to redeliver the vessels to the board free from all operating debts, the accounts to be audited and the board to have any and all profits earned by the vessels, and the plaintiff to stand all losses, if any, incurred in their operation. Considerable correspondence followed. The board adopted resolutions on January 25, 1921, authorizing the audit of plaintiff's accounts, and the return of the vessels.

The vessels were delivered to the board, and during the course of the proceedings the board did offer the plaintiff a right to rescind the contract of sale upon the condition that the net profits from the operation of the vessels under the terms of the MO3 agreement were not less than the sums deposited and forfeitable under the May 29, 1920, agreement. This offer the plaintiff expressly declined. Thereafter the plaintiff preferred its claim to the board for the return to it of the deposited sums. Finally, following the opinion of the general counsel of the board, the plaintiff's claim for a return of the deposit was denied and the same retained, the board being of the opinion that it was not lawfully authorized to relinquish a legal right without consideration.

The agreement of May 29, 1920, was an executory contract for the sale of the two vessels involved. Possession but not title, passed to the plaintiff under it. The plain terms of the agreement clearly indicate the intention of the parties. The plaintiff was to have possession of the vessels under the agency and operating agreement of March 5, 1920, at the same time obligating itself to purchase the vessels when future conditions rendered it possible to sell the same. The binding obligations of this agreement are apparent, and the plaintiff complied with its part of the undertaking in every respect. The plaintiff now says that it must be relieved from the agreement because the defendant did not in all respects observe the terms of the same, in so far as it agreed to sell

said vessels upon the terms and conditions of its standard sales policy and instead offered terms of sale radically different therefrom.

Manifestly this contention, in the light of the findings, is one not insisted upon by the plaintiff in its correspondence in reference to the issue. The plaintiff's interest in the purchase of the vessels originated in its purpose to transport large cargoes of munitions of war to Russia. Contracts for transportation between the Russian Volunteer Fleet and the plaintiff so to do existed, and there was nothing then in the way of accomplishing them. In fact, one large cargo was aboard one of the vessels when governmental permission to so transport was withdrawn. As a result of this interdiction and acute competition as to freight rates between the United States and foreign countries, the plaintiff found itself unable to finance the undertaking and frankly so stated. It is now contended that the plaintiff is entitled to a recovery because the board did not accept its offer in accord with the precise terms of its standard sales policy, and hence no valid contract of sale came into existence. It is true the board did not strictly observe the terms of its standard sales policy. That it accepted the offer and amount of the bid is evidenced by the tender to the plaintiff of the mortgages and notes to carry the same to completion; acceptance did not exact a more formal act. If one submits a bid and the other party tenders papers sufficient to cover the transaction, the act of the latter clearly evidences acceptance. The primary difficulty with the plaintiff's contention is that the terms of the sale of the vessels were modified at the plaintiff's suggestion. The controlled account, which tied up the revenues received from the operation of the boats, a stipulation creating the same being found in both the MO3 agreement and the standard sales policy of the board, had been rescinded by mutual agreement, and the plaintiff in consideration thereof had incorporated the operation of the vessels as it agreed to do.

The effect of the waiving by the board of this method of security for the payment of deferred installments of the purchase price of the vessels essentially changed the char-

acter of the terms of sale, and the provision of the standard sales policy providing for the execution of a preferred mortgage upon the vessels, which was dependent upon the controlled account, became ineffective and would have left the board with no greater security for the vessels than the promissory notes executed by the corporations and endorsed by the plaintiff. In other words, the terms of the standard sales policy simply provided that when installment payments made under the controlled account equalled 50% of the purchase price, the controlled account would be released and a preferred mortgage on the vessels taken by the board to secure the remaining 50%. The modification of the controlled account carried with it the 50% mortgage provision and essentially changed the transaction. The plaintiff interposed no objection whatever to the modified terms of sale, or the change made at its request in the standard sales policy of the board. Again, the plaintiff insists that under the standard sales policy the plaintiff was to execute and deliver to the board a contract for the purchase of the vessels containing the terms of the standard sales policy within 10 days after receipt of such a contract from the board, and that this was not done.

What does the record disclose in this respect? September 9, 1920, the plaintiff submitted its bids. In the letter submitting the bid for the *Westmount*, attention was called to an overpayment of deposits, which the plaintiff asked to be refunded. This is not all. The plaintiff previous to this time, i. e., on August 24, 1920, had in a letter referred to in Finding VIII expressly notified the board that if the controlled account provision of the standard sales policy was to obtain, the plaintiff on account of financial conditions would not wish to carry through the transaction at all. So that on the date of the submission of its bids there was then pending before the board, at the plaintiff's insistence, the issue of the modification of the standard sales policy of the board with respect to the release of the controlled account, and the question was not finally adjusted until October 18, 1920 (Finding IX), when the plaintiff expressly signified its willingness to sign the notes as the modified agreement contemplated. Thereafter the transaction proceeded in accord with

the modified agreement. Therefore, in so far as the 10-day provision is involved, the delay was due exclusively to the plaintiff, for its especial benefit, and an agreement evolved in accord with plaintiff's wishes. What the board agreed to do in the first instance was to submit to the plaintiff a contract of sale in accord with its standard sales policy, and the plaintiff was to execute and deliver the same to the board within 10 days from its receipt. The performance of this stipulation was rendered impossible by the plaintiff, not the board.

In *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 119, the Supreme Court said:

"The courts at one time seemed to be quite strong in their views and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendency was to construe the language as a penalty, so that nothing but the actual damages sustained by the party aggrieved could be recovered. Subsequently the courts became more tolerant of such provisions, and have now become strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained. This whole subject is reviewed in *Sun Printing & Publishing Association* v. *Moore*, 183 U. S. 642, 669, where a large number of authorities upon this subject are referred to. The principle decided in that case is much like the contention of the Government herein. The question always is, what did the parties intend by the language used? When such intention is ascertained it is ordinarily the duty of the court to carry it out. See also *Clement* v. *Cash*, 21 N. Y. 253, 257; *Little* v. *Banks*, 85 N. Y. 258, 266."

Defendant's counterclaims

The first counterclaim rested upon a difference between the contract price for which the vessels were sold and the market value of the same on the date of the refusal to purchase, and may, we think, be disposed of upon the facts. This counterclaim involves a large amount, to wit, $1,575,-425.47. The *Westmount* was delivered to the board on February 12, 1921, and the *Cascade* on March 21, 1921. Subse-

quent to the delivery of the vessels the board made no serious attempt to dispose of them; on the contrary, the board retained them and valued the same at $185.00 per deadweight ton. This valuation was in excess of the plaintiff's purchase price. The vessels were not offered for sale at any available market price until subsequent to January, 1922, at a time when practically no market existed for them. If the valuation fixed by the board at the time of the breach indicates market value, the board's loss was insignificant, and assuredly no legal right obtained to retain the vessels until their worth dwindled to such an extent as to be almost worthless, and then charge the plaintiff with the loss suffered. From the record it is apparent that the board was content to accept a redelivery of the vessels, relying upon the forfeiture of deposits made to cover the loss. In addition to this, the dual character of the agreement of May 29, 1920, was construed by the board as entitling the plaintiff to an accounting for the operation of the vessels under the agency agreement of March 5, 1920. This is manifest from the attitude of the board with respect thereto. No demand was made by the board upon the plaintiff for any amount except the sums due under the agency agreement of March 5, 1920, and no claim of any character was ever preferred against the plaintiff for a loss due to the difference in market value of the vessels, until this counterclaim was filed.

The single demand of the board is evidenced by the letter of its chairman of November 1, 1924 (Finding XVII). This letter is predicated upon an audit of the plaintiff's accounts under the MO3, or agency agreement, and not upon any other alleged loss. It is conceded by a stipulation of the parties (Finding XVIII) that errors in the original computation reduced the sums claimed in the letter to $85,-100.17, and for this amount the defendant is entitled to a judgment.

The second counterclaim concerns income taxes. The plaintiff on June 16, 1919, filed its income-tax return for the period from June 1, 1918, to December 31, 1918. On October 16, 1923, the Commissioner of Internal Revenue assessed additional taxes in the sum of $5,873.22 for this period.

On March 15, 1920, plaintiff filed its income-tax return for the year 1919, and the commissioner thereafter, on June 25, 1925, made an additional assessment of $1,278.56. The plaintiff has not paid the additional assessments and no suit or proceedings of any character was ever instituted by the commissioner to collect the same until this counterclaim was filed April 14, 1928. The plaintiff pleads the statute of limitations, relying upon sec. 250 (d) of the revenue act of 1918 (40 Stat. 1057, 1083) and the same section of the act of 1921 (42 Stat. 227, 265). We think the plea is well taken. *Russell* v. *United States*, 278 U. S. 181, and *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346. The last additional assessment was made more than five years after the return was filed.

The third counterclaim is troublesome. On November 20, 1919, the board submitted for sale by advertisement two Kirby sailing vessels of specific tonnage. In addition to the sailing vessels certain steamship hulls described as in various stages of completion were to be disposed of, and the sailing vessels themselves were in course of completion moored at Beaumont, Texas. The plaintiff submitted its bid for the sailing vessels offering in its first bid $21.40 per ton therefor, and accompanying the bid with a certified check for $50,000. Subsequently this bid was withdrawn and another substituted, changing its bid to the flat figure of $42,-800.00 for each of the vessels. The substituted bid was accepted by the board and by its terms the plaintiff obligated itself for not only the stated purchase price, but agreed in addition to pay for all *fittings*, "whether on the hulls, in the yards or elsewhere at the inventory appraised price," and the cost of installing the same on the hulls. When the time arrived for a settlement as to the cost and expense of installing all fittings a controversy developed as to what items in the inventory of so-called fittings should or should not be classified as such. The difference in the sums claimed is most substantial, the board now insisting in this counterclaim that *fittings* include all that was added to the vessel subsequent to its sale, amounting to $51,758.41; the plaintiff on the other hand conceding liability to the extent only of $4,130.42. Expert testimony was adduced, and obviously the

subject matter is one determinable from evidence of that character. The advertisement offering all the vessels for sale is confusing. It is difficult to ascertain whether the board was soliciting bids for sailing vessels, that is incomplete sailing vessels, except as to *fittings*, or whether it was intending to designate this class of vessels as hulls. It would, as plaintiff suggests, have been more in accord with established practice to have said to prospective bidders the vessels are offered "as is" and "where is" if the intention was to sell them in their then condition. What the plaintiff evidently intended, as its express offer clearly indicates, was to purchase the vessels on a *bare-boat* basis, assuming liability for the necessary fittings and cost of installation. In accepting the final bid of the plaintiff the board gave a written notice to the plaintiff that the vessels were sold on a *bare-boat* basis, the purchaser to pay "for any and all fittings that go with these vessels." No doubt the plaintiff would have considered its offer of purchase in a much different light if it had anticipated an additional expense over and above its bid of over fifty thousand dollars, and there is manifestly room for entertaining an intent on the part of the board to sell all accumulated materials on hand, as well as the incomplete hulls. Under these circumstances it seems to us that in a ship transaction between parties dealing in that class of commodities, familiar with technical terms used in the trade, and the extent and meaning of the same, the terms so used should be restricted to their technical meaning. The board proposed them, formulated the advertisement, and the plaintiff, it seems, had a right to rely upon their accepted meaning. To sell a sailing vessel on a bare-boat basis is uniformly understood in the shipping world to contemplate a vessel ready for sailing except as to crew and the incidentals appurtenant to and necessary for the maintenance of the crew. To sell a hull and the necessary *fittings* to complete the vessel can not by any possibility, in view of this record, be made to comprehend the numerous items for which the court is now asked to charge against the plaintiff as fittings. This term, according expert testimony its worth, may not be extended to include items other than those essential to bring the hull of the vessels to a bare-boat status. This view of the situation

we think is sustained by the board's action with respect thereto, for notwithstanding the lapse of seven years no bill was ever rendered to the plaintiff or its surety for this claim until after this suit was commenced. The defendant is entitled to a judgment upon this item, $4,130.42.

The defendant in an amended counterclaim charges the plaintiff with improperly and mistakenly deducting $11,-908.68 from balances due the board under the final settlement made as to the MO3 contract. The plaintiff contends that this amount is included in the balance admitted to be due, i. e., the $85,100.17 item. We think the plaintiff's contention is sustained by the record. Finding XVIII depicts the situation.

Judgment for the United States in the sum of $89,230.59. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and GRAHAM, *Judge*, concur.

ATLANTIC TRANSPORT CO., LTD., v. THE UNITED STATES

[No. C-1087. Decided April 7, 1930. Motion for new trial overruled December 1, 1930]

On the Proofs

Salvage services; contract; burden of proof to establish contract.—The question whether a case of assistance rendered at sea by one vessel to another is one of salvage or contract depends upon the facts in each particular case, and the burden is upon the party asserting that it was a contract to establish that fact.

Same; towage and salvage.—Where services that would otherwise be merely towage are rendered to a disabled vessel with the purpose of relieving her from danger, they are to be classed as salvage.

Same; principle of salvage awards; unsuccessful efforts.—The principle observed in deciding that an award shall be made for honest effort and willing purpose to assist in salvage that, due to accident, is unsuccessful, is that the saving of life and property at sea must be encouraged.

Same; measure of success necessary to award.—Complete success is not necessary to entitle the salvor to an award.

Same; "success" defined.—The contingency of success on which an award for salvage depends is to be construed as the success that depends upon equipment, ability, personal effort, not the success that depends upon accident.

Same; wireless assistance.—The bringing in of another salvor through wireless assistance is in the nature of salvage.

The Reporter's statement of the case:

Mr. Eugene Underwood for the plaintiff. *Mr. Chauncey I. Clark* and *Burlingham, Veeder, Masten & Fearey* were on the briefs.

Mr. J. Frank Staley, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The Atlantic Transport Company, Ltd., a British limited company, at the time of the filing of the petition and amended petition and during the period of the salvage services in question, was the chartered owner of the British steamship *Bardic* under the terms of an informal charter arrangement with the vessel owners, the Oceanic Steam Navigation Company, Ltd., a British limited company, the terms of which are set forth in certain letters attached to the amended petition marked "Exhibits A, B, and C," which are made a part of this finding by reference.

The *Bardic* was a steel twin-screw steamship of 8,010 tons gross, 4,916 tons net register, 450.4 feet long, and 58.4 feet beam. She was built in 1919, and at the time of the services in question was of the approximate value of $1,047,932.62.

II. The *Powhatan* was in 1920 a steel twin-screw steamship of 10,531 tons gross and 6,420 tons net register, 499.3 feet long, 60.2 feet beam, and was built in 1899. At the time of the services in question she was owned by the United States of America and was being operated as an Army transport. Her salved value was $650,000, and that of her cargo $600,000.

III. Upon the voyage in question, on January 16, 1920, the *Powhatan* left New York with cargo, full crew, and 187 enlisted men and one officer for transportation upon a voyage to Antwerp, Belgium.

On the morning of January 18 she broke down at sea; her fireroom became flooded, making it necessary for the crew to draw the fires and leave the fireroom. The ship was therefore without any steam power, and it was accordingly impossible to operate the dynamos which supplied the ship's electrical power.

At 1.00 p. m. the *Powhatan* sent out S O S call reading as follows:

"S O S.—U. S. A. T. *Powhatan.* Lat. 41.05 N., long. 62.10 W. Firerooms flooded, pumps choked, water gaining."

IV. The freighter *Western Comet*, owned by the United States, was the first to arrive in response to the S O S. She was sighted by the *Powhatan* at 2.45 p. m. and at 4.00 p. m. hove to one and a half miles off the *Powhatan* starboard bow, there then being heavy seas and strong winds so that it was impossible to render assistance.

V. At the time of the receipt of the S O S the *Bardic* was approximately 120 miles west of the disabled *Powhatan*, which was virtually in the projected course of the *Bardic*.

Upon receiving the S O S the *Bardic* altered her course slightly in order to arrive at the position given by the *Powhatan* and sent the following radiogram:

"COMMANDER, *Powhatan:*

"At 5.30 G. M. T. I was 120 miles west of you. Am steaming toward you at 12 knots. Is your position desperate and do you need my assistance?

"CLARET, *Master 'Bardic.'* "

The *Powhatan* replied:

"COMMANDER, *Bardic:*

"Will not need your assistance as *Cedric* is coming. Thank you.

"RANDALL, *'Powhatan.'* "

The master of the *Bardic*, however, continued to proceed toward the *Powhatan* as developments might render the *Bardic's* assistance essential. While thus proceeding the *Bardic* received the following radio message:

"'*Western Comet*' *and all ships:*

"Have requested S. S. *Cedric* stand by and also request you do same period have 500 persons on board and fire-

rooms partly flooded. Desire ships stand by until result of efforts to raise steam and start pumps is known.

"RANDALL, *Master U. S. A. T. 'Powhatan.'* "

The *Bardic* continued toward the *Powhatan* and came in sight of her and hove to about 10 p. m. At 12.00 midnight the steamship *Cedric* approached and stood by, and at 5.00 a. m. a fourth steamer arrived.

VI. After the arrival of the *Bardic* the masters of the *Powhatan* and *Bardic* entered into an agreement for the latter vessel to stand by and to tow the former when the weather moderated, this agreement being reached through the exchange of the following radiograms:

"COMMANDER, *Powhatan:*

"S. S. *Bardic* now in sight of S. S. *Powhatan.* Do you require us to stand by?

"CLARET, *Master.*"

"COMMANDER, *Bardic:*

"Which way are you bound and how many passengers can you accommodate?

"RANDALL, *U. S. A. T. Powhatan.*"

"COMMANDER, *Powhatan:*

"*Bardic* bound London. No passenger accommodation. Willing to tow you to Halifax when weather moderates.

"CLARET, *Master.*"

"COMMANDER, *Bardic:*

"Have you any heavy towing gear?

"RANDALL, *Powhatan.*"

"COMMANDER, *Powhatan:*

"Yes, a 7-inch steel towing hawser.

"CLARET, *Master.*"

"COMMANDER, *Bardic:*

"Stand by to take us in tow when weather moderates.

"RANDALL, *Powhatan.*"

"COMMANDER, *Powhatan:*

"Yes we will comply with your request to stand by for purpose of towing you when weather moderates.

"CLARET, *Master.*"

VII. While standing by the *Powhatan* the *Bardic* prepared her equipment for towing. A six-inch steel hawser was laid out on deck and the one end secured to the main-

mast. Stop lines of one and a half inch tarred hemp were fastened to the hawser at intervals of 8 to 10 fathoms. The hawser was secured to the deck by these stops, which were fastened to any available projection thereon in such manner as to be subsequently cut or released in sequence by the crew as the hawser was payed out.

By the morning of January 20 everything was complete to commence towing operations. On January 19 the *Bardic* received a radiogram from the *Powhatan* giving their noon position and stating that they had unshackled the port chain ready to shackle to the wire and requesting that they be given the size of the opening of the jaw required for the shackle. The radiogram also contained the suggestion that the *Powhatan* request a destroyer to hold the *Bardic* in position while the ships were connected up, as the *Powhatan* had no steam and must fleet the wire aboard with capstan and tackle.

VIII. During the morning of the 20th the master of the *Bardic* received the following three messages from the master of the *Powhatan:*

"Commander, *Bardic:*

"We are ready with our line.

"RANDALL."

"Commander, *Bardic:*

"We are ready when you are.

"RANDALL."

"Commander, *Bardic:*

"Will take your line through port bow chock so that if you can keep a bit to lee it will help.

"RANDALL."

No destroyers were present at that time.

An effort by the *Bardic* was thereupon made to connect the vessel by means of the towing hawser. The *Bardic* maneuvered slowly along the windward or starboard side of the *Powhatan* and fired three rockets with light lines attached. The third rocket was successful in getting a light line across, and several lines of increasingly larger size were passed between the vessels, these lines being hauled aboard the *Powhatan* by the soldiers and crew. An eight-inch manila hawser was finally hauled aboard the *Powhatan* lead-

ing through the port bow chock, the outer end of this being secured to the six-inch steel hawser laid out on the deck of the *Bardic.*

It was necessary for the *Bardic* to keep as close as possible to the *Powhatan* to reduce the weight and the length of the hawsers which were being hauled aboard the *Powhatan* by man power alone. At the same time it was necessary to maneuver the *Bardic* to hold this position as far as possible so that a collision between the two vessels should be prevented.

The *Powhatan,* having a great deal of deck structure, drifted with the wind, while the *Bardic,* a freighter, having very little deck structure and being deeply laden, drifted with the sea, rendering it difficult to maintain the vessels in position. A heavy swell was running and the master of the *Bardic* was maneuvering the ship in the meantime, trying to hold her in proper position in respect to the *Powhatan.* A double watch was maintained in the engine room during this period and both starboard and port engines and screws were operating at various speeds during this maneuvering. Due to the force of the wind and sea, the *Powhatan* with her higher superstructure moved ahead relative to the *Bardic* so that her bow overlapped the stern of the *Bardic.* When the ships reached this position about 20 or 30 fathoms of the steel hawser had been payed out from the *Bardic* and was being pulled toward the *Powhatan.* The *Bardic* was still on the starboard or weather side of the *Powhatan* and the eight-inch line which was being heaved in through the port bow chock of the *Powhatan.* By virtue of the overlapping of the ships, it extended around the bow of the *Powhatan,* causing a "nip" in the line and therefore making it difficult to haul in. The master of the *Bardic* was attempting to work his ship ahead with both engines at this time which would tend to relieve this situation. With the ships in this position and about five hundred feet apart, the rolling and plunging of the ships threw such a strain on the connecting hawsers between them that several of the hemp stops or fastenings securing the wire hawser to the *Bardic's* deck broke and about 20 or 30 fathoms of the steel towing wire suddenly slipped overboard from the *Bardic* and fouled the

port propeller which was operating at that time. At the time none of the steel hawser had as yet reached the *Powhatan.*

The port engine was at once stopped and efforts made for several hours to release the hawser from the propeller. At the time of the accident all available members of the crew were on the deck of the *Bardic* and in charge of the steel hawser and lines.

The officers and crew of the *Bardic* used all necessary care in the salvage operations and the accident was not due to negligence or want of care upon their part.

IX. After attempting for several hours to free her propeller the *Bardic* signalled to the *Powhatan* to pull in the eight-inch manila hawser as much as possible and to cut it, and the *Bardic* thereupon proceeded to the nearest port, Halifax, by the use of her starboard engine and propeller alone in order to have her port propeller cleared. The *Powhatan* was left in the company of the S. S. *Western Comet* and the United States destroyers which arrived after the fouling of the propeller.

X. The *Powhatan* was subsequently towed to Halifax by the *Western Comet* and by tug boats from Halifax which had been ordered in the meantime, reaching there on the night of January 27, 1920.

XI. During her trip to Halifax, the *Bardic* was difficult to steer as only one propeller was capable of being used and the towing wire dragging from the port propeller tended to swing the boat in a circle. She came to anchor at Halifax 12.50 a. m., January 22. Because of the very low temperature, which was about 12 degrees Fahrenheit, the diver experienced great difficulty in working, but the propeller was finally cleared and the *Bardic* sailed from Halifax for London at 7.35 p. m., January 24.

XII. The expenses incurred at Halifax were as follows:

	Canadian dollars	American money
Harbor master's fee, paid Jan. 27, 1920	$7.00	
Signal station fee, paid Jan. 27, 1920	1.00	
Sick mariners' fund fee, paid Jan. 27, 1920	73.73	
Inward pilotage fee, paid Jan. 30, 1920	51.00	
Outward pilotage fee, paid Jan. 30, 1920	26.40	

Reporter's Statement of the Case

	Canadian dollars	American money
Shipping men, paid Jan. 28, 1920	$2.10	
Towage charges paid Jan. 30–Feb. 16, 1920	382.50	
Survey by Lloyds Register of Shipping, paid Jan. 28, 1920	30.00	
Note of protest, paid Jan. 30, 1920	2.50	
Survey by London Salvage Association, paid Feb. 4 1920	65.00	
Diver, apparatus and attendants, paid Jan. 30, 1920	480.00	
Medical attendance, paid Jan. 23, 1920	20.00	
Taxi hire, paid Jan. 23, 1920	8.50	
Taxi hire, paid Jan. 27, 1920	7.75	
Stevedores, paid Jan. 30, 1920	70.00	
Agency fee, paid Feb. 12, 1920	100.00	
Telegrams and cables, paid Feb. 5, 1920	18.93	
Total	1,346.41	$1,232.099
Overtime of crew assisting divers to clear propeller, paid Jan. 23, 1920 (£4 17 6)		18.369
Total		1,250.47

XIII. It has been stipulated and agreed that the rates of exchange for the purposes of this case shall be $3.76827 for the English pound and $0.9151 for the Canadian dollar.

These rates are the average rates over the periods in which plaintiff paid the various items set forth in Findings XII, XV, XVI, and XVIII.

XIV. The loss of time on the voyage of the *Bardic* was from 10 p. m., January 18, at which time the *Bardic* reached the *Powhatan* (which was virtually in her original projected course) and entered into the agreement to stand by and tow until 3 p. m., January 25, at which time the *Bardic* had completed the portion of her trip from Halifax to London, equivalent to returning to the initial position where she had formerly found the *Powhatan*. The total time was a period of 6 days and 17 hours, or 6.71 days.

XV. By reason of the *Bardic* standing by the *Powhatan*, her attempt to tow and the subsequent fouling of the port propeller, and trip to Halifax, all of which consumed a period of 6.71 days, certain items of expense were incurred which have been paid for by plaintiff as follows:

	English money	American money
Provisions at sea per day	£19 4 11	$72.52
Wages at sea per day	47 1 9	177.43
Ship's stores consumed at sea per day	29 17 0	112.47
Insurance and protection club calls per day	20 11 0	77.43
Daily charter hire per day	77 19 6	293.81
Total per day		733.66
Total for 6.71 days		4,922.86
Coal consumed while standing by *Powhatan*, proceeding to Halifax, in Halifax, and returning to position of *Powhatan*, 229 tons @ 132/8d per ton (£1,519 0 8)		5,723.72
Total		10,646.58

XVI. The *Bardic* arrived in London on February 7, 1920, and after discharging her cargo went to dry dock for survey and repairs.

The survey disclosed that the rope guard on the port propeller had been broken away, the guard ring was distorted and out of place, and the check ring for the lignum vitæ bush was buckled and started. This damage which was caused by the fouling of the port propeller was repaired, the *Bardic* being in dry dock two days.

The expenses incurred in dry-docking, in making the above-mentioned repairs, repairing the steel towing hawser, and replacing the rockets and lines, were as follows:

	English money	American money
Survey by London Salvage Association	£7 11 6	$28.54
Port of London Authority for dry-docking	331 2 5	1,247.66
R. H. Green & Silley Weir, Ltd., repairs	27 9 0	103.43
Bullivant & Co., repairing steel hawser	5 10 0	20.72
Shore gang, labor and material to and from dock	19 19 1	75.18
Wages and victualling of crew	117 9 3	442.60
Hawkins & Tipson, to replace lines	117 18 11	444.52
Jas. Pain & Sons, rockets, etc	6 15 0	25.43
Coal consumed going to and from dry dock	79 12 0	299.93
Total		2,688.01

XVII. In order to save time in dry dock the cast-iron propeller guard which was lost as a result of the fouling of the propeller was replaced by a wrought-iron propeller

guard. Two days' time of the *Bardic* was saved by so doing. A cast-iron propeller guard similar to the one lost, and which is better suited to the purpose for which the propeller guard is designed, would fairly and reasonably have cost $37.68 more than the wrought-iron propeller guard actually installed.

XVIII. The average daily net profit earned by the *Bardic*, as ascertained by the average daily net profit predicated upon the two voyages prior to and the two voyages subsequent to the one in question, is £215 2 2 or $810.53 computed on this basis, and for the total period of time lost by the *Bardic*, 8.71 days, this would total a sum of $7,059.71.

Under the terms of the charter one-half of the net profits was retained by the plaintiff, who was charterer of the *Bardic*, and one-half was payable to the Oceanic Steam Navigation Company, Ltd., owner of the *Bardic*, as part of the charter hire. Each company, therefore, would have allocated to it one-half of the computed lost net profits, which would amount to $3,529.86, as a result of the *Bardic's* departure from her own pursuits to assist the *Powhatan* at the *Powhatan's* request.

XIX. The total of the expenditures at Halifax and London, costs and expenses incurred by the *Bardic* during the 8.71-day period, and loss of profit, is $21,644.77.

XX. The *Powhatan's* wireless was in charge of an experienced wireless operator. The ship was equipped with a Navy standard 2-kilowatt set with an auxiliary battery of 120 volts. There was also available another storage battery on the ship and some dry cells.

The normal source of energy for the radio equipment of the *Powhatan* was the ship's electrical plant. This source of energy failed about 4.30 to 5.00 p. m., January 18, 1920, after her fireroom became flooded. The only energy supply thereafter available comprised the storage batteries and dry cells, which sources would be depleted both in proportion to the extent of use and the degree of power used which is concomitant with the distance or range of desired transmission.

In order to conserve as much energy as possible against any possible contingency, certain messages originating on

the *Powhatan* were relayed or retransmitted by the *Bardic* which had offered to assist the *Powhatan* in this respect, and which offer was accepted by the *Powhatan's* wireless operator.

The *Bardic* also transmitted a special signal of two dashes and three dashes so that the United States destroyers could locate the position of the *Bardic* and *Powhatan* by means of their direction-finding apparatus.

It is common or customary practice at sea for one vessel to relay messages for another where the two vessels involved belong to the same wireless company, but there is a charge for this when they belong to different companies.

There is no satisfactory evidence as to what the custom is in an emergency of the character here involved.

XXI. The *Western Comet*, which was the first vessel to arrive at the *Powhatan's* position, and which vessel stood by and subsequently took the *Powhatan* in tow after the fouling of the *Bardic's* propeller, was equipped with a 2-kilowatt Navy standard wireless equipment common to almost all Shipping Board vessels, and had two wireless operators on board. The wireless equipment was in good first-class working condition, and while standing by messages were exchanged with the *Powhatan*.

XXII. On February 7, 1920, a claim on account of the services alleged in the petition was filed with the transportation service of the United States War Department. The claim was disallowed and no sums whatsoever have been paid to the plaintiff or to the Oceanic Steam Navigation Company, Ltd., or to the master, officers, and crew of the *Bardic*, or to any of them on account of the matters alleged in the petition.

On or about November 24, 1920, the Oceanic Steam Navigation Company, Ltd., filed its libel against the United States of America in the district court of the United States for the southern district of New York alleging as its authority therefor the act of March 9, 1920, and setting out substantially the matters alleged in the petition and praying for a decree making a liberal salvage award.

On or about June 21, 1921, the United States of America filed its answer which consisted, among other things, of

exceptions to the libel on the ground that the court was without jurisdiction thereof. The court, in fact, had no jurisdiction of the cause of action alleged in the libel under the act of March 9, 1920, and the suit was discontinued by order dated December 16, 1924.

No actions, except the claim filed with the transportation service of the War Department and the suit filed by the Oceanic Steam Navigation Company, Ltd., against the United States in the United States district court for the southern district of New York, have been had on the claim alleged in the petition herein in any of the departments or in the Congress or courts of the United States.

XXIII. Neither plaintiff nor the Oceanic Steam Navigation Company, Ltd., nor the master or crew of the *Bardic*, or any of them, has in any way voluntarily aided, abetted, or given encouragement to rebellion against the Government of the United States.

XXIV. The plaintiff, Atlantic Transport Company, Ltd., and the Oceanic Steam Navigation Company, Ltd., are British limited companies.

Citizens of the United States are accorded the right to prosecute against the Kingdom of Great Britain cases similar in their nature to that set forth in the petition herein on the same basis and without any conditions or restrictions other than such as are imposed upon citizens of said Kingdom of Great Britain.

XXV. The plaintiff brings this suit on its own behalf and on behalf of the Oceanic Steam Navigation Company, Ltd., owner of the *Bardic*, and on behalf of the master and crew of the *Bardic* at the time of the services rendered to the *Powhatan*. No other persons or corporations have any interest in the claim, and no assignment or transfer thereof, or any part thereof, or interest therein, has been made. The claim for salvage is stated to have arisen about January 18–21, 1920.

The court decided that a salvage award should be made in the sum of $30,682.46 to the following parties: To the officers and crew of the *Bardic* the sum of $2,250; 37½ per

cent, or $3,375, each to the Atlantic Transport Company, Ltd., charterer, and the Oceanic Steam Navigation Company, Ltd., owner, their respective shares of the $9,000, a part of the award, and the balance of the total award, or $21,682.46, to the plaintiff.

GRAHAM, *Judge*, delivered the opinion of the court:

This case involves, first, the question whether it is one of salvage or contract, and, second, whether, if it is a case of salvage, it was, under the facts, one in which as a part of the award there should be allowed a sum to make the plaintiff whole for losses and damage to its vessel, the *Bardic*, incident to its unsuccessful effort to tow the defendant's ship, the *Powhatan*.

The question whether a case of assistance rendered at sea by one vessel to another is one of salvage or contract depends upon the facts in each particular case, and the burden is upon the party asserting that it was a contract to establish that fact. *The Camanche*, 8 Wall. 448, 477; *The Independence*, 2 Curtis 350, 357; and *The Excelsior*, 123 U. S. 40, 49, 50. We are of opinion that the proof in this case does not establish a contract. On the contrary, it shows that this was a case of salvage—a consent upon the part of the plaintiff to stand by and to tow, no consideration being mentioned and no method fixed by which a consideration was to be determined, no meeting of minds in a contract. It was not what could be called a towage contract or arrangement such as tugs specially equipped for salvage and engaged in that business make, or mere towage of a vessel out of port by a tug. It is

"* * * in the interest of commerce and navigation that where a vessel gives a signal of distress and another goes out with the bona fide intention of assisting that distress, and, as far as she can, does so, and some accident occurs which prevents her services being as effectual as she intended them to be, and no blame attaches to her, she ought not to go wholly unrewarded. I think it is for the interests of commerce and of navigation, and also for the encouragement of salvage services generally that some remuneration should be given." *The Melpomene*, L. R., 4 Adm. and Ecc. 129.

In *Santa Rosa*, 5 Fed. (2d) 478, the court said, practically upholding the same principle:

"* * * it will not do, either because it was not possible to extricate the ship earlier from her perilous position, or because the tugs rendering service at the beginning had not met with success, or that it was believed necessary to call in more powerful and better equipped wrecking vessels, to whistle down the wind the claims of those who diligently performed their duty and happened unaided not to be successful."

While there are cases which hold that success in the effort to salvage is necessary to an award, there are cases also which hold that it is not. Pro and con the cases are very numerous and it will serve no good purpose to attempt to harmonize them. It is therefore necessary to invoke some general principle of salvage and see how far it can be applied to the instant case. The court looks with favor upon salvage. It is in the nature of a reward for meritorious services rendered in laborious and perilous enterprises. *Bull Insular S. S. Co. et al.* v. *United States*, 62 C. Cls. 338, 350, 351. Where a vessel is in distress, in peril and danger, as here, or where the sea is rough and the weather unfavorable and the wind high, or where other facts which usually attend a vessel in distress exist, there is always a risk and danger in rendering assistance. It is easier for another vessel to stay out of the way or to pass by and not attempt to render assistance than it is to undertake the risk of doing so and incur a risk of injury to itself and a possible loss of life and cargo in connection with the effort. It has therefore been the policy of the courts in order to encourage salvaging and the saving of life and property at sea, to be liberal in the matter of salvage where the vessel has made an honest effort to be of assistance or has joined with others in doing so, whether its efforts resulted in the final saving of the vessel or not, provided the failure or final success was not due to any lack of honest effort and willing purpose to assist.

In *The I. W. Nicholas*, 147 Fed. 793, the rule was stated to be that "entire" success was not necessary to establish the right to salvage, and in that case it appears there was

some service rendered. So in *The New Orleans*, 23 Fed. 909, some service was actually rendered. The same situation prevailed in the case of *The Annie Lord*, 251 Fed. 157, where the rule is stated:

"It is not necessary, in order to establish a claim to salvage, that the salvor should actually complete the work of saving the property at risk. It is sufficient if he endeavor to do so, and his efforts have a *causal* relation to the eventual preservation of it." (Italics ours.)

And in *The Alcazar*, 227 Fed. 633, there appeared to be services rendered which placed the imperiled vessel in a position of "greater comparative safety."

So with *The Strathnevis*, 76 Fed. 855, it was said that complete success was not necessary, but that a *contribution* to success would entitle to salvage. See also *The Flottbek*, 118 Fed. 954.

In *The Veendam*, 46 Fed. 489, in distinguishing between mere towage and salvage, it is said:

"Such services are treated as salvage when rendered to a disabled ship with the obvious purpose of relieving her from circumstances of danger, either present or reasonably to be apprehended, and not merely to expedite her passage." Citing cases.

In that case the towing vessels actually rendered a service so long as it was necessary.

In *The Pendragon Castle*, 5 Fed. (2d) 56, the salvor acted as convoy and lent men to jettison cargo, and this was held to constitute salvage service. The convoyed vessel was not very leaky and made port otherwise unassisted. The essential service was convoying.

The *Santa Rosa case*, *supra*, is more nearly in point. Here salvage was allowed tugs that were not sufficiently powerful to float the stranded vessels and whose efforts were without avail. The vessel was later pulled off by a more adequate vessel, a wrecking tug, assisted by two others. Notwithstanding the efforts of the first tugs were unsuccessful, they in fact rendering no contribution to the salvage, salvage was awarded them.

Opinion of the Court

The last case is very much like the plaintiff's case. In fact, plaintiff's case is stronger, because the lack of actual salvage was not due to lack of power or facilities, but due merely to accident incident to service that could not be forestalled.

The Manchester Brigade, 276 Fed. 410, throws some light upon the rule that allows salvage for the encouragement of the service. *The Manchester Brigade* stood by the distressed vessel and got a towline aboard, but it was slipped later on account of the danger of parting the cable due to heavy seas. When the weather moderated preparations were made to get the line aboard, but *The Manchester Brigade* was dismissed in favor of another vessel which had been ordered up by the distressed vessel's owners to take it in tow. The court awarded salvage, stating:

"* * * where the services of the salvor vessel have been accepted and she is able and willing to do everything that is necessary to complete the salvage, but is dismissed or superseded for reasons of convenience or economy on the part of the vessel in distress, the services rendered are salvage services and should be rewarded to the same extent and in the same degree as though the service were completed, having regard, of course, as in all salvage cases, to the risks actually encountered in the service and to the time and expenses incurred. That this rule should obtain is in the interest, not alone of commerce, but to encourage assistance to life and property when either are in danger, and requires no citation of authority to sustain it; for otherwise, having regard to the frailties of human nature, there would be little inducement to the masters of vessels to engage in such undertakings and to imperil their own vessels and endanger their own lives if the reward were contingent, not only upon success, but also upon the whim of the owner or master of the vessel in distress." *Id.* 413.

If the reward were also contingent upon absence of a disabling accident, the contingency would resolve itself into a mere chance of success. The contingency of success should be construed as the sort of success that is dependent upon equipment, ability, personal effort, not the success that depends upon accident.

In *The Manchester Brigade case*, *supra*, the award was moderated by the availability of the wireless. *Id.* 414. If

such a rule be sound, the bringing in of another salvor through wireless assistance would logically be in the nature of salvage.

In *The Flottbek*, *supra*, it is said:

"There is a marked and clear distinction between a towage and a salvage service. When a tug is called or taken by a sound vessel as a mere means of saving time, or from considerations of convenience, the service is classed as towage; but if the vessel is disabled, and in need of assistance, it is a salvage service. In cases of simple towage, only a reasonable compensation is allowed, as upon a quantum meruit. In case of salvage, the award is upon a broader and more liberal scale, * * *."

In *Huasteca Petroleum Co.* v. *United States*, 27 Fed. (2d) 734, the trial court made no allowance for damage to the *St. Heliers* by grounding her stern while rendering assistance. However, the Circuit Court of Appeals held:

"It is clear that damage sustained by the salvaging vessel without negligence on her part is a proper element to be considered in determining the award to be given her," citing *The Alabama*, 280 Fed. 738; *The Edith L. Allen*, 129 Fed. 209; *The Apalachee*, 266 Fed. 923; *Kennedy* v. *Crane*, 215 Fed. 897.

See also *The Elkridge*, 24 Fed. (2d) 147.

In the instant case the *Bardic's* assistance was solicited and it was notified by the *Powhatan* that it was ready to take the line, and it attempted to do all that it was asked to do, all that it could do, and its success was prevented by an accident incurred by its effort. It was not a tug engaged in the salvaging business. It first answered the SOS call, was the first ship to arrive in sight and in the neighborhood of the disabled ship, and offered to use what facility it had for towing the *Powhatan* to a place of safety. The offer was accepted. It was requested to stand by and wait until the weather moderated. This it did. In the meantime it relayed messages which brought other ships upon the scene. When the weather moderated, at a signal from the distressed ship, it undertook to attach to it the steel hawser which it had on board for the purpose of towing. This steel hawser was attached to a manila rope or hawser used for the pur-

pose of drawing it aboard. The *Bardic* maneuvered and after several efforts was able to place the end of this manila hawser aboard the *Powhatan*. The *Powhatan* began to draw in the manila hawser by passing it through the chock on the port bow side, while the *Bardic* was on the starboard side. The boats were 500 feet apart and the sea was rough. The *Powhatan* having more of its body above the water than the *Bardic* was more easily moved by the wind and the sea and thus moved faster and ahead of the *Bardic*. By this overlapping of the ships and the pushing forward of the *Powhatan* a nip or catch was caused on the bow of the *Powhatan* which impeded the hauling in of the manila hawser and thus caused a slackening of the line. By reason of this and the plunging of the ships the fastenings which secured the hawser to the *Bardic* deck broke and about 20 or 30 fathoms of steel towing wire suddenly slipped overboard from the *Bardic* and fouled the port propeller which was operating at that time.

At this time none of the steel hawser had as yet reached the *Powhatan*. The port engine was stopped on the *Bardic* and efforts were made during several hours to release the propeller from the hawser, without success, when the *Bardic* signalled the *Powhatan* to pull in the manila hawser that was attached to the steel hawser and cut the steel hawser loose. This done, the *Bardic* in its crippled condition proceded to the port of Halifax, using her starboard engine and propeller alone, in order to have her port propeller cleared. After having made this and other repairs due to the accident, the *Bardic* was towed to Halifax by another boat.

The court has found that the breaking of the fastenings holding the steel hawser on the *Bardic* which caused the accident and the consequent fouling of the propeller of the *Bardic* was not due to any want of care upon the part of the management of the *Bardic*. Whether the accident was caused by the attempt by the *Powhatan* to heave in the hawser through its port bow chock instead of hauling it aboard first and then attaching it, or whether it was due to the heavy wind and sea, or a combination of both, what happened might have been avoided if the hawser had first been partially pulled aboard the *Powhatan* before attempt-

ing to pass it through the chock. However, it appears that the accident was not due to any want of care by the *Bardic*. It does not appear that the action of the wind and the sea had changed during the attempt to put the hawser aboard from what it was before the effort began.

After receiving temporary repairs at Halifax the *Bardic* proceeded to London and went into dry dock, where further repairs were made, and was in dry dock there two days for this purpose. The court has found that the repairs so made were made necessary by reason of the accident. We therefore reach the conclusion that a salvage award should be made in favor of the plaintiff in the sum of $9,000 plus the sum of $21,682.46 for expenses, repairs, etc., making a total of $30,682.46, to be distributed to the parties entitled thereto as follows: To the officers and crew of the *Bardic* the sum of $2,250 and 37½ per cent, or $3,375, each to the Atlantic Transport Company, Ltd., charterer, and the Oceanic Steam Navigation Company, Ltd., owner, their respective shares of said $9,000, the balance, $21,682.46, to be paid to the plaintiff. The latter sum is made up of expenses incurred as shown by Findings XII, XV, and XVI, of additional cost of new propeller guard as shown by Finding XVII, and of the loss of profits as shown by Finding XVIII. Judgment should be entered accordingly, and it is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

DE LAVAL STEAM TURBINE CO. v. THE UNITED STATES

[No. A-82. Decided April 30, 1930. Motion for new trial overruled November 3, 1930.]

On the Proofs

Just compensation; cancellation of contracts, act of June 15, 1917; contracts entered into before and after said act; prospective profits; value of contracts; interest recoverable.—Where plaintiff sues to recover from the Government just compensation for cancellation, under the act of June 15, 1917, of its contracts with

Reporter's Statement of the Case

third parties, it is not entitled as a part thereof to prospective profits notwithstanding some of them were entered into prior to the act of June 15, 1917. As a part of just compensation it is entitled (1) to the value of the contracts, which are not to be considered as without value merely because they are not marketable, and (2) interest on its actual expenditures less payments received on the contracts, together with interest on other items of recovery.

The Reporter's statement of the case:

Mr. Jesse C. Adkins for the plaintiff. *Mr. George C. Holton* was on the brief. *Messrs. John S. Flannery* and *Frank F. Nesbit* were on the brief in support of motion for new trial.

Mr. Arthur Cobb, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Assistant Attorney General Charles B. Rugg* was on the brief in opposition to the motion for new trial.

The court made special findings of fact, as follows:

I. The plaintiff, De Laval Steam Turbine Company, is, and at all times mentioned in the findings of fact was a corporation engaged in the business, among other things, of manufacturing marine steam turbines and reduction gears and spare parts therefor.

II. Prior to January 12, 1918, the plaintiff had entered into thirteen written contracts with certain firms and corporations for the manufacture by it of certain steam-turbine propulsion units for ships. All of these contracts were taken over by the Government in the manner hereinafter set forth, but there is no controversy except as to three of them, which are set out below, showing the Government number thereof, the corporations with whom the contracts were made, the payments which had been made thereon before the Government took the contracts over, and the contract price.

U. S. S. B. E. F. C. contract number		Payment on account	Contract price
5006	G. M. Standifer Construction Corporation	$73,500	$735,000
5012	Turbine Equipment Company—Luckenbach	68,559	216,000
5013	Supple & Ballin	15,000	150,000

All of these contracts were for the construction of certain turbine equipment for ships not necessary to be herein described.

A copy of the Standifer contract is attached to the petition and marked "Exhibit B–1"; copies of the Turbine Equipment-Luckenbach contracts are attached to the petition and marked "Exhibit C–1" and "Exhibit C–3"; and a copy of the Supple & Ballin contract is attached to the petition and marked "Exhibit A–1". These contracts are made part of this finding by reference to said exhibits.

III. Thereafter, and at the time of the receipt by plaintiff, as hereinafter set forth, of notice that the defendant had requisitioned and taken over the said contracts referred to in Finding II, the plaintiff was engaged in the performance of these contracts, had provided itself with materials, equipment, and labor to perform said contracts, had partly performed the same, and was ready, able, and willing to complete such performance.

IV. In the early part of the year 1918, and after plaintiff had commenced work on these contracts, the United States Shipping Board Emergency Fleet Corporation served upon plaintiff a notice and order of requisition with reference to each of the three contracts above mentioned, and by letter signed by one of its officials separately advised plaintiff and the several parties with whom these contracts had been made that the several contracts had been requisitioned by the Government, and that the United States would make just compensation for the turbine equipment which the plaintiff was required to complete, and further advised the plaintiff that the Emergency Fleet Corporation assumed the responsibility of these contracts and would make payment to plaintiff, and in several letters with reference to these contracts stated both that the Government had requisitioned the contracts and that it had requisitioned the turbines.

V. About April 20, 1918, the Fleet Corporation agreed to purchase from plaintiff and plaintiff agreed to sell to it certain spare parts for turbine equipments constructed or being constructed by plaintiff under the contracts mentioned in Finding II. This contract was subsequently modified by eliminating therefrom certain spare parts and the contract

as amended was referred to as P. D. 1779. On June 2, 1920, the plaintiff and the Fleet Corporation entered into a written agreement wherein it was stated with reference to contracts 5006, 5012, and 5013 (called original contracts) that the Fleet Corporation had "duly requisitioned said original contracts and the material to be delivered thereunder and ordered the contractor [plaintiff] to complete same on behalf of the United States"; also that the Fleet Corporation had issued a certain purchase order, P. D. 1779, providing for the manufacture and delivery of spare parts, and that on account of the general curtailment of the Fleet Corporation's "program of ship construction subsequent to the signing of the armistice," it became necessary, in the public interest, to suspend operations under said contracts and purchase order, and that upon the request of the Fleet Corporation the plaintiff had suspended operations thereon and thereunder, also that while "the original contracts and the purchase order have not been completely performed but in preparation therefor and as part of complete performance, the contractor has properly employed capital, made expenditures and incurred obligations and liabilities, including work, labor, and services necessarily rendered in connection therewith."

The agreement further stated that the Fleet Corporation had awarded to plaintiff on account of the original contracts and purchase order, and the suspension and cancellation thereof $88,723.63, and the contractor being unwilling to accept the award was to be paid seventy-five per cent thereof, or $66,542.72. This amount was paid plaintiff August 17, 1920, and plaintiff reserved the right to bring suit for the amount which it claimed was due.

VI. From time to time before orders were finally given to stop all work on the contracts, at the request of defendant certain modifications were made therein and complied with by plaintiff, and in particular with reference to the contract P. D. 1779. The Fleet Corporation failed to carry out its contract with reference to certain spare parts for turbine equipment specified in the Standifer contract and as to spare parts for the turbine equipment specified in the Supple & Ballin and Turbine Equipment-Luckenbach contracts.

Reporter's Statement of the Case

This failure was due to the curtailment of the Fleet Corporation's program of ship construction subsequent to the signing of the armistice. At all times plaintiff was ready, willing, and able to complete the contracts as provided in the original agreements.

VII. The turbines, reduction gears, and spare parts specified in the contracts in controversy herein were of a special type and design requiring special skill and experience, together with trained employees and a specially designed plant, equipment, and facilities for the manufacture thereof. At the time the contracts were requisitioned the demand for such machinery was greater than the supply, and the price for all materials purchased by the plaintiff for the contracts had increased over the prices paid by plaintiff for the same.

All of the materials acquired and assembled by the plaintiff at its plant for the performance of these contracts were subject to the control of the Fleet Corporation, and much of the materials for the machinery manufacture were large and cumbersome. On receipt of the orders to stop work these parts were placed by plaintiff wherever they could be in its machine shop and casting yard, storing the same in the best possible manner under the circumstances.

The Fleet Corporation failed from the time of said orders to stop work until January 14, 1920, to release said materials from the effect of said requisition orders, or to inform plaintiff whether it would require the delivery thereof, or agree with plaintiff as to what should be done with the same.

The expenses and cost necessarily incurred by plaintiff in handling, caring for, and storing said materials for said Supple & Ballin, Standifer, and Turbine Equipment-Luckenbach contracts, and the reasonable value of plaintiff's space occupied by said materials during the period from said orders to stop work until January 14, 1920, are $15,000.00, apportioned to the three contracts, as follows:

Supple & Ballin contract	$2,025.00
Standifer contract	7,950.00
Turbine Equipment-Luckenbach contract	5,025.00

VIII. While plaintiff was engaged in providing material and carrying on the work necessary to complete the con-

tracts hereinabove referred to, including the contract called P. D. 1779, the defendant notified plaintiff to stop work thereon, which it accordingly did. Defendant paid plaintiff for such work as had been performed on the contracts, and it was later agreed between the plaintiff and the Fleet Corporation that plaintiff should take over the materials acquired and on hand at its plant for the performance of said contracts at a salvage value on the Supple & Ballin contract of $3,011.88, on the Standifer contract of $10,684.15, on the Turbine Equipment-Luckenbach contract of $5,612.32, and on P. D. 1779 of $841.53, making a total of $20,149.88 for which the Fleet Corporation took credit.

IX. Plaintiff's actual costs and expenditures incurred in and about performance of the Supple & Ballin contract up to the time defendant directed it to stop work thereon were $45,918.73. At the time of said order to stop work, plaintiff could have completed performance of said Supple & Ballin contract at a further cost of $66,122.45, or a total cost of $112,041.18, to fully perform said contract, and would have made profits of $37,959.16 by fully performing said contract.

X. Plaintiff's actual costs and expenditures incurred in and about performance of the Standifer contract up to the times defendant directed it to stop work thereon were $169,-772.74 with respect to the nine turbines on which work was stopped pursuant to said orders. At the time of said orders to stop work, plaintiff could have completed performance of said Standifer contract at a total cost (including said $169,-772.74) of $416,234.50, and would have made profits thereby of $318,765.50. The cost to plaintiff of the one turbine and fourteen other pumps manufactured and delivered to defendant under the Standifer contract was $53,782.03.

As alleged in the petition, plaintiff completed and delivered to defendant certain of said turbine equipment under the said Standifer contract, and was paid therefor the sum of $78,220 "in accordance with said Standifer contract." This sum was paid in the following manner: The Fleet Corporation paid plaintiff $1,700 on account of two pumps having been completed and delivered to it by plaintiff on the Standifer contract; also paid plaintiff, in three install-

ments, $64,620 on account of a geared marine turbine having been completed and delivered under the Standifer contract; and $11,900 on account of fourteen other pumps having been completed and delivered under the Standifer contract.

XI. Plaintiff's actual costs and expenditures incurred in and about performance of the Turbine Equipment-Luckenbach contract up to the time defendant directed it to stop work thereon were $73,008.16. At the time of said order to stop work, plaintiff could have completed performance of said Turbine Equipment-Luckenbach contract at a further cost of $141,582.69, or a total cost of $214,590.85 to fully perform said contract, and would have made profits of $13,939.15 by fully performing said contract.

XII. On February 19, 1919, defendant directed the plaintiff to stop work on the contract called P. D 1779. Plaintiff's actual costs and expenditures incurred in and about performance of P. D. 1779 up to the times defendant directed it to stop work thereon were $9,029 exclusive of the cost of a set of spare parts delivered to and paid for by the Fleet Corporation. At the time of said orders to stop work, plaintiff could have completed performance of that part of P. D. 1779 upon which work was ordered stopped, as aforesaid, at a further cost of $16,586.22, or a total cost of $25,615.22 to fully perform said contract, and would have made profits of $33,193.78 by fully performing that part of said contract.

XIII. Plaintiff's turbines and gears were the result of several years' development and experimental work, and each was designed to meet particular conditions and was a separate engineering problem.

Under the Supple & Ballin, Standifer, and Turbine Equipment-Lukenbach contracts plaintiff was obligated to manufacture and deliver its special type and design of turbines and reduction gears, and was to manufacture them by means of the employment of the special designs, skill, and experience of plaintiff and its trained employees, and its specially designed plant, equipment, and facilities for the performance of such contracts; these contracts required that the gears and pinions be cut on special machines designed and built by plaintiff, and these gear-cutting machines embodied special design, which was a secret of plaintiff; and such con-

tracts and obligations by their very terms and nature were not assignable by plaintiff.

Likewise, the materials ordered by plaintiff at the times of requisition for said contracts were special, consisting principally of castings and forgings of special sizes, design, and character, cast or forged for use in building the particular De Laval turbines and gears specified in these contracts and suited and of value for that purpose only.

At the time of the requisitioning of these contracts the turbine situation was abnormal; the market price for turbines was in excess of the prices fixed in plaintiff's contracts which were requisitioned and the prices for all materials purchased by plaintiff for those contracts had increased over the prices paid by plaintiff for those materials. The demand for turbine machinery was greater than the supply. There was a shortage of propelling equipment for ships being built by the Fleet Corporation. Shipbuilders generally wanted turbines instead of engines.

For these reasons the interests, rights, and obligations of manufacturers under contracts of this character were not at any time bought or sold on the market, and there was not at any time a market value for plantiff's interests, rights, and obligations under the Supple & Ballin, Standifer, and Turbine Equipment-Luckenbach contracts.

XIV. An order of January 2, 1919, directed plaintiff to stop work on the eight turbines being constructed under the Supple & Ballin and Turbine Equipment-Luckenbach contracts. On February 3, 1919, the Fleet Corporation gave plaintiff a new schedule of the order in which it wished the remaining turbines on the uncompleted contracts to be completed and delivered. The schedule made drastic changes in the order of deliveries; it postponed the time of delivery of four turbines from the dates given on the last preceding schedule; it restored six turbines on earlier schedules but omitted from the preceding one, and for the first time fixed the dates at which the Fleet Corporation desired delivery of the ten turbines called for by the Standifer contract.

On February 19, 1919, defendant directed plaintiff to stop work on four of said Standifer turbines, but to proceed on the remaining six; on April 14, 1919, the Fleet Corporation

directed plaintiff to stop work on five more of said Standifer turbines, but to proceed on the tenth.

These orders to stop work on the requisitioned contracts and the changes made by the schedule of February 3, 1919, caused plaintiff to perform an unusual amount of clerical work in connection with its shop-scheduling system, which was costly and would not have been necessary but for defendant's failure to perform said contracts. They also disarranged and upset plaintiff's program of manufacture. At the receipt of the order of April 14, with respect to the Standifer contract, some of the parts for the turbines thereunder were being machined on the machine tools, and it was necessary to take them off the tools without completion. As to all the contracts, plaintiff had all the drawings, jigs, gauges, and fixtures out and distributed for their manufacture, and when the orders to stop work came plaintiff had to move all these, as well as the parts from the tools, and endeavor to provide the shop with other work as soon as possible. This rendered useless the scheduling already done and required the rescheduling of work in the shop. The orders to stop work in conjunction with said schedule change caused confusion, congestion, idleness by machine operators and machine tools, and interference with the efficiency of plaintiff's operations, and additional clerical work, the cost of which to plaintiff amounted to $30,000.

XV. The actual costs and expenditures and the credits to which defendant is entitled thereon are upon the several contracts as follows:

SUPPLE & BALLIN CONTRACT

Actual costs and expenditures (Finding IX)		$45, 918. 73
Credit by Supple & Ballin payment (Finding II)		15, 000. 00
Balance due at time of cancellation of contract		30, 918. 73

STANDIFER CONTRACT

Actual costs and expenditures (Finding X)		223, 554. 77
Credit by Standifer payment (Finding II)	$73, 500. 00	
Credit by Fleet Corporation payments (Finding X)	78, 220. 00	
		151, 720. 00
Balance due at time of cancellation of contract		71, 834. 77

TURBINE EQUIPMENT—LUCKENBACH CONTRACT

Actual costs and expenditures (Finding XI)	$73,008.16
Credit payment by Turbine Equipment Co. (Finding II)	68,559.00
Balance due at time of cancellation of contract	4,449.16

P. D. 1779 CONTRACT

Actual costs and expenditures (Finding XII)	9,029.00

XVI. The value of the contracts involved in the case at the time of their cancellation and the loss sustained by the plaintiff by reason of their cancellation was $8,500.00, which is a part of the just compensation due plaintiff in addition to the balances due on said contracts, as shown in Finding XV, and the expense incurred by plaintiff by reason of disarrangement of its work, as specified in Finding XIV.

The court decided that plaintiff was entitled to recover $84,074.34, with interest at the rate of six per cent per annum from August 17, 1920, until paid; and also $8,500.00, with interest at the rate of six per cent per annum from March 17, 1919, until paid.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff brings this suit to recover what it alleges to be just compensation for the action of the defendant in canceling four contracts which plaintiff held, and directing work thereon to cease.

It appears without dispute from the evidence that in the years 1917 and 1918 the plaintiff, which is a builder of turbine equipment for the propulsion of vessels, had entered into thirteen contracts with various parties for the construction of such equipment. Of these contracts, only three give rise to any controversy involved in the case, namely, those entered into with the following-named parties: G. M. Standifer Construction Corporation, Turbine Equipment Company—Luckenbach, and Supple & Ballin. The other contract in dispute was made directly with defendant by plaintiff for the construction of the same kind of equipment. In the early part of the year 1918, and after plaintiff had incurred cost and expenditures on these con-

tracts, the United States Shipping Board Emergency Fleet Corporation served upon plaintiff a notice and order of requisition with reference to each of the three contracts above mentioned as having been made with parties other than the Government, and by letter signed by one of its officials separately advised plaintiff and the several parties with whom these contracts had been made that the several contracts had been requisitioned by the Government, and that the United States would make just compensation for the turbine equipment which the plaintiff was required to complete, and that the Emergency Fleet Corporation assumed the responsibility of these contracts and would make payment to plaintiff; also, in several letters with reference to these contracts, stated both that the Government had requisitioned the contracts, and that it had requisitioned the turbine equipment.

While plaintiff was engaged in providing materials and carrying on the work necessary to complete the contracts hereinabove referred to, including the contract made directly with the Government, the defendant notified plaintiff to stop work thereon, which it accordingly did. Defendant paid plaintiff for such work as had been performed on the contracts, and it was later agreed between the plaintiff and the Fleet Corporation that plaintiff should take over the materials acquired and on hand at its plant for the performance of said contracts at a salvage value specified for each contract and amounting to a total of $20,149.88, for which the Fleet Corporation took credit.

In addition to the profits which plaintiff alleges it would have made had it been permitted to carry out the contracts, the plaintiff seeks to recover all actual costs and expenditures incurred in the work up to the time it was stopped by the direction of the Shipping Board, together with the cost of caring for, handling, and storing materials from the time when the work was stopped until the defendant finally directed the disposition thereof, and also for extraordinary expense which plaintiff claims was incurred by reason of being compelled to stop the work on the contracts. With reference to these claims the defendant, while conceding that plaintiff is entitled to just compensation for

damages received by the cancellation of the contracts, insists that plaintiff can in no event recover for prospective profits, that the amount of damages claimed by plaintiff on account of actual expenditures for work and materials and as compensation for handling and storing materials greatly exceeds the amount which can properly be allowed on account of these claims. Defendant also insists that plaintiff is not entitled to anything whatever on its claim for extraordinary expense alleged to have been caused by interference with the orderly procedure of plaintiff's shop work by reason of the cancellation of the contracts.

These defenses constitute the issues in the case and present for decision the following questions:

First, whether plaintiff can, in any event and on any of the contracts, recover for prospective profits, and if so in what amount?

Second, if not entitled to recover prospective profits, whether plaintiff can recover the value of its contracts at the time of cancellation, if they had a value?

Third, what amount should be allowed plaintiff for actual costs and expenditures?

Fourth, what amount should be allowed plaintiff as cost of caring for, handling, and storing materials?

Fifth, whether plaintiff should be allowed anything for extraordinary expense, and, if so, in what amount?

Another question which has not been discussed in argument also arises as to whether plaintiff is entitled to interest on the items which make up the amount of its recovery.

Considering the first of these questions, we find that defendant contends that under the act of June 15, 1917, 40 Stat. 182, ch. 29, the Government had the right to cancel all or any part of the work provided for by these contracts whether between the Government and another party or between private parties, where the Government had taken over or requisitioned the contracts, and that it has been so held in *Russell Co.* v. *United States*, 261 U. S. 514, 519-521, and that the same rule is laid down in *Meyer Scale & Hardware Co.* v. *United States*, 57 C. Cls. 26, and having this right there can be no recovery in the case except for actual costs and expenditures, etc.

It is clear that the Government had the right of cancellation for the act of June 15, 1917, authorized the President, in subdivision (b) thereof—

"(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material."

In *Russell Co.* v. *United States*, *supra*, it was held that this provision of the statute applied to all contracts in relation to ships and materials therefor, whether between the Government and another party or between private parties; and in the same case, the court said:

"The contract, we must assume, was entered into with the prospect of its cancellation in view, since the statute was binding and must be read into the contract. The possible loss of profits therefore must be regarded as within the contemplation of the parties."

The decision in the *Russell Co. case*, therefore, clearly determines that when such contracts were entered into after the enactment of the statute to which reference has been made, there can be no recovery for prospective profits.

While two of the contracts in question were entered into prior to the time that the statute referred to went into effect, an examination of the decisions of the Supreme Court leads us to the conclusion that the plaintiff must be denied a recovery for prospective profits on these contracts also. In giving our reasons for this conclusion it becomes necessary to accurately keep in mind the facts in the case at bar in order to properly apply the rules laid down by the Supreme Court.

Counsel for plaintiff contend that it is entitled to just compensation for the acts of the Government, and that under the decisions of the Supreme Court just compensation is the value of the property taken at the time of the taking. It must be conceded that the plaintiff is entitled to just compensation for the acts of the Government, but there was in fact no property taken; instead the contracts were canceled. It is true the Shipping Board notified the plaintiff that the contracts had been requisitioned, but it also notified the plaintiff that the Government had taken over

the contracts and would assume the obligations thereof. Afterwards the contracts were canceled, and if plaintiff maintains its action at all it must base it upon this cancellation. This, however, does not deprive it of just compensation, for the same statute that provided for the cancellation of the contracts also provided that—

"Whenever the United States shall cancel * * * any contract, * * * it shall make just compensation therefor,"

but in no case has the Supreme Court held that "just compensation" included prospective profits. On the contrary, in the case of the *Russell Co.*, *supra*, which was like the case at bar, being one in which the manufacturer was bringing the suit and seeking to recover damages by reason of the cancellation of the contract, the Supreme Court said:

"In fixing just compensation the court must consider the value of the contract at the time of its cancellation, not what it would have produced by way of profits for the car company if it had been fully performed."

The case of the *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, is relied upon by plaintiff but it does not support its contention. The plaintiff in that case was allowed the value of its contract but anticipated profits were not allowed. As before stated, the Supreme Court has uniformly held that just compensation did not include anticipated profits. In this connection it should be noted that in the *Russell Co. case*, *supra*, where the manufacturer was seeking to recover anticipated profits as a part of just compensation, it was said:

"This contention confuses the measure of damages for breach of contract with the rule of just compensation for the lawful taking of property by the power of eminent domain."

We therefore feel constrained to hold that the plaintiff in this case can not be allowed for anticipated profits on any of the contracts, notwithstanding the fact that if it had been permitted to complete them substantial profits would have been realized.

This brings us to the second question in the case which is whether the plaintiff can recover the value of its contracts at the time of cancellation.

We have already shown by a quotation from the opinion in the *Russell Co. case* that the Supreme Court has held that "in fixing just compensation the court must consider the value of the contract at the time of its cancellation," and in accordance with that ruling we have determined this value from the evidence. In the *Russell Co. case* the Supreme Court stated "that no prudent person, desiring to acquire this contract, would have paid for it the full amount which could be realized upon completion." In the case at bar no outside person would have paid anything for the contracts for the reasons stated in the findings (see Finding XIII), but the fact that owing to the peculiar circumstances of this case no one would have desired to purchase them does not show that they had no value to plaintiff, nor does it show that plaintiff has suffered no loss by reason of the cancellation thereof which would be included in just compensation. On the contrary, the evidence clearly shows that the contracts had a value to plaintiff and that it suffered a loss by reason of the cancellation thereof outside of the profits which it anticipated. We think also that the court may determine the amount of this item from all of the facts and circumstances in the case which bear thereon, as shown by the evidence, and have fixed the amount thereof in the findings at $8,500.00. In the opinion of this court rendered in the *Russell Co. case*, 57 C. Cls. 464, 491, this is denominated a "cancellation allowance," but the question of what it should be called is not important. The real point is that we hold that it is a proper item to be included in just compensation.

The next question to be determined is what amount should be allowed plaintiff as the cost of caring for, handling, and storing materials.

As before stated, the defendant insists that the amounts claimed by plaintiff for actual costs and expenditures incurred in the work which had been done on the contracts before cancellation, and for taking care of, storing, and handling materials which it was compelled to take care of until

defendant finally directed their disposition, are excessive. Counsel for defendant also claim that the amount allowed on these items by the commissioner, which is much less than that claimed by plaintiff, is also excessive, but after going over the evidence we think the amount allowed by the commissioner is substantially correct and have adopted it in the findings of fact.

On the next question as to whether the plaintiff is entitled to anything for extraordinary expense caused by the cancellation of the contracts the evidence shows clearly that the plaintiff is entitled to recover on this item and the only difficulty in connection with it arises with reference to the amount.

The plaintiff claims $100,000 damages by reason of the stopping of work on the contracts, causing what is called extraordinary expense, including additional clerical hire, additional manufacturing cost, and interference with the efficiency of plaintiff's plant operation. Counsel for defendant insist that it is entitled to nothing on this item. The commissioner allowed $30,000. It would serve no useful purpose to review the evidence in support of this item. Necessarily, as shown by the findings, as to all of the contracts, plaintiff had to withdraw all the drawings, jigs, gauges, and fixtures intended for the work contemplated by the contracts, and it would be some time before the work could be rescheduled, the operatives reassigned to new work, and the books rearranged in conformity therewith. There is no way of estimating the amount which should be allowed exactly, but here again we think the commissioner was substantially correct and have adopted his findings after having gone over the evidence.

As before stated another question arises, not specially argued, as to whether the plaintiff is entitled to interest on the several items of its recovery. If the instant case had been one in which the amount of plaintiff's recovery was to be determined by a contract, we think it clear that no interest could be allowed; but we think it is not a case upon a contract but one in which the amount of plaintiff's recovery is determined by a special statute which provides that it shall receive just compensation. In the opinion on the *Russell Co.*

case handed down by this court (57 C. Cls. 464), this court said that the case under consideration was not one on a contract but under a special statute and interest was awarded. This decision was subsequently affirmed on review by the Supreme Court (261 U. S. 514), and was followed by the Court of Claims in a number of cases, upon some of which certiorari was denied.

The question of whether this court can allow interest on claims such as are involved in the case at bar seems to us to be settled by the decisions of the Supreme Court. In the case of *Brooks-Scanlon Corp.* v. *United States*, *supra*, the Supreme Court, reviewing the decision of this court, said (p. 123):

"If the taking precedes the payment of compensation, the owner is entitled to such addition to the value at the time of the taking as will produce the full equivalent of such value paid contemporaneously. Interest at a proper rate is a good measure of the amount to be added. *Seaboard Air Line Ry. Co.* v. *United States*, *supra; United States* v. *Benedict*, 261 U. S. 294, 298; *Brown* v. *United States*, 263 U. S. 78."

It is true in this case we have found that the contracts were canceled and not appropriated but the statute upon which this action is based provided, as we have already shown, that "just compensation" should be awarded. The citation from the *Brooks-Scanlon case*, *supra*, shows the doctrine expressed therein was based upon *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, and other cases, wherein it was held that just compensation included an award of interest from the time that the claim against the Government first accrued. There can be no difference in the principle between the allowance for interest made in the *Brooks-Scanlon case* and the allowance of interest to the plaintiff in this case from the time that its respective claims accrued. It is allowed not as interest, but, as stated in the *Brooks-Scanlon case* and other cases, as a good measure of the amount to be added for the delay in payment; otherwise the plaintiff would not receive just compensation.

Following the rule above stated, we hold that just compensation entitles the plaintiff to interest at the rate of six per cent upon the amount of its actual expenditures less pay-

ments upon the several contracts. This interest should be calculated thereon from an equated date determined by considering the amount due on the several contracts and the date when each was canceled, and we find this equated date to be March 17, 1919. In this connection it should be stated that the defendant's attorneys practically concede that the plaintiff is entitled to an allowance of this kind, which, in the brief on behalf of defendant, is fixed at ten per cent of the amount of actual outlay and expenditures on the part of the plaintiff, which, however, are fixed at a less amount than that to which we think the plaintiff is entitled. This court in the *Russell Co. case*, *supra*, added the amount of the "cancellation allowance" to the amount of the other items of damages which the court found the plaintiff had sustained, and the total thereby obtained was held to constitute "just compensation." In this case we are obliged to keep this cancellation allowance, as we have called it for want of a better term, separate, as it will draw interest from a different date, but we arrive at the total amount of just compensation in the same manner as this court did in the *Russell Co. case*.

The plaintiff is also entitled to interest on the amount of its other items of recovery and the method which we have used in calculating the amount of interest is as follows:

Interest will be computed on the balance of the amount expended on each contract separately, from the date of cancellation thereof up to the time when the salvaged materials were received. From the total of the costs and expenditures (less credits) together with the interest computed as aforesaid, the agreed value of the salvaged materials will be deducted. Upon the amount remaining interest will be computed up to the time of payment of the award. To this balance due on costs and expenditures, together with interest, will be added the amounts allowed for extraordinary expense and cost of handling and storing materials. From the total thus obtained the amount paid on the award will be deducted to obtain the balance due at the time of payment of the award. The plaintiff is entitled to recover this balance, namely, $84,074.34, with interest thereon at the rate of six per cent per annum from date of the payment of the award until paid, together with a "cancellation allowance" of

$8,500.00, with interest at the rate of six per cent per annum from March 17, 1919, until paid. Judgment will be rendered accordingly.

Williams, *Judge;* Littleton, *Judge;* and Booth, *Chief Justice*, concur.

SUPPLEMENTAL OPINION ON MOTION FOR NEW TRIAL

Green, *Judge*, delivered the opinion of the court:

Plaintiff's motion for new trial is based in part upon an erroneous statement. The court did not hold in the original opinion that plaintiff's property and contract rights were requisitioned. On the contrary, no such language is found in the opinion. The original opinion did state that the Shipping Board notified the plaintiff that the contracts had been requisitioned, but the other language contained in the notice, and other facts and circumstances which were set out at considerable length in the opinion showed exactly what was done in the transactions between the Government and the plaintiff, and made it evident in the opinion of the court that "there was in fact no property taken." If the defendant had requisitioned and taken over the contracts of the plaintiff, it would have put itself in the place of plaintiff with reference to these contracts and been obliged to manufacture the machinery for the purchasers in accordance with the terms of the contracts. This is just what the defendant did not do. The contracts of the *purchasers* were requisitioned, and the defendant put itself in the place of the parties who made the contracts with the plaintiff. All this was not only stated in the notices given plaintiff by defendant, but plaintiff accepted this construction and so treated defendant throughout all the transactions had between them.

The motion for new trial also involves a fundamental error as to what was involved in the case. The matter upon which the case turns is not whether some technical or intangible right of plaintiff was requisitioned. In the opinion of the court, as stated in the former opinion, plaintiff's right to recover in the case must be determined under the act of

June 15, 1917, providing that the Government had the right to cancel all or any part of such contracts as are involved herein, and its right to recover must be limited by the rule laid down in *Russell Motor Car Co.* v. *United States*, 261 U. S. 514. Counsel for plaintiff call attention to the fact that in the *Russell Motor Car Co. case* the contract in question was made after the enactment of the 1917 statute referred to above. This is true, but in the case of *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, the contract was made prior to the time of the enactment of this statute, but the acts upon which the plaintiff's claim is based were done under this statute, as they were in the instant case. The facts in that case differed somewhat from those in the case at bar in that the plaintiff in the *Brooks-Scanlon case* was the purchaser of the product to be manufactured, and in the case at bar the plaintiff is the manufacturer. By reason of this fact there was a dissenting opinion, but in neither the majority nor minority opinion was any question raised as to the application of the act of June 15, 1917. In fact the act by its express terms authorized the President "to modify, suspend, cancel, or requisition *any existing* or future contract * * *," (italics ours) and by its language and under the holding of the Supreme Court applied equally to contracts made before its passage as well as to those made afterwards while the act was in force—at least where the contracts were entered into when the Government was engaged in a war. As to the constitutionality of that portion of the act which made it apply to existing contracts, we have no doubt. No one would contend that the Government could not, under the stress of war, deprive a citizen of his most valuable right—his liberty—press him into its service, expose him to hardship, danger, suffering, and even death, and yet pay for these acts only what it provided in its laws. If it can do this, it surely can authorize the cancellation of a contract entered into in time of war even though it be made between two citizens prior to the passage of the act authorizing its cancellation and may provide that the parties to such contract shall receive only just compensation for this action. As to what items shall enter into this "just compensation," we are bound by the decisions of the Supreme

Court in the *Russell Motor Car Co. case*, *supra*, and the *Brooks-Scanlon case*, *supra*, both of which hold that prospective profits constitute no part of "just compensation" in such cases. It should also be noted that in the two cases last cited, the Supreme Court appeared to assume that there could be no question but that the act of 1917, above referred to, was constitutional as to contracts made in time of war whether made before or after the passage of the act.

The case of *Burns et al., Receivers*, v. *United States*, 66 C. Cls. 142, 146, is cited as being directly in conflict with the decision of the court in the case at bar. This is an error. There is no conflict between the two decisions, and the decision cited has no application to the instant case. In the instant case, the contracts were made in war time and controlled by a statute enacted in war time by virtue of which the Government exercised its war powers; in the *Burns case*, the contract was made in peace time, all the transactions involved occurred in peace time, and after the war statute which controls the case at bar had been repealed. It was an ordinary case for a breach of contract, governed by the legal principles that prevail in time of peace.

Having determined that the right of plaintiff to recover was controlled by the act of 1917 above referred to, the court in the former opinion turned to the case of *Russell Motor Car Co.*, *supra*, to ascertain the rule or rules for fixing the amount of plaintiff's recovery. There is no claim made in argument that the case last cited was not followed by the court in this respect, but it is contended that the decision therein is not controlling. It seems to be thought by plaintiff's attorneys that there was something in the decision indicating as they state that "the court did not think" that the Government had any power to modify a contract between private parties, even in time of war, but the language of the opinion is clearly to the contrary. It was specially contended by plaintiff in the *Russell Motor Car Co. case* that the statute did not apply to contracts between the Government and private parties, and the court said:

"We do not mean to deny the power of Congress, in time of war, to authorize the President to modify private con-

tracts (leaving the parties free, as between themselves, to accept or not), nor do we suggest that Congress has not done so by the present statute."

The court goes on to say that it does not concede that the power in question is limited to private contracts. The quotation shows that this contention on the part of the plaintiff is without merit. The other objection to the application of the doctrines laid down in the *Russell Motor Car Co. case*, namely, that two of the contracts were made prior to the enactment of the statute of 1917, we have already shown not to be well founded.

Counsel for plaintiff assert that Finding XV is based on a miscalculation which made the costs and expenses to be allowed on the Standifer contract $31,617.97 less than they should be. There is no miscalculation involved in Finding XV. The calculation made by plaintiff's counsel is based on the theory that the Standifer contract could be separated into contracts for the specific articles provided for therein, but the Standifer contract was indivisible. Plaintiff's counsel make their calculation under a theory by which the payments made on the Standifer contract are held to be payments for the articles completed. This is a mistake. The contract specified one price for all the machinery to be constructed under it. Both the turbines and the pumps were constructed under the contract and included in it, and the payments were made on the contract. With reference to payments, the contract provided—

"Ten per cent of contract price with signed contract; seventy per cent when shipped; ten per cent thirty days after shipment; ten per cent sixty days after shipment."

It will be observed that ten per cent on the whole contract price on all the machinery contracted for was paid in advance. The amount of this payment was $73,500 as shown by Finding II. When two pumps were completed under the contract, the Fleet Corporation paid plaintiff $1,700. When a geared marine turbine was completed thereunder, $64,620 was paid in three installments; and when fourteen more pumps were delivered, defendant paid plaintiff $11,900. It

may be that defendant paid a greater amount or earlier than was required by the contract, but this did not make these items payments for specific machinery. They were payments on the contract made when the machinery was delivered, and not payments for profits as plaintiff contends. There can be no question but that if the contract had been completed these payments must have been credited on the entire purchase price.

The second paragraph of Finding X, however, may be somewhat ambiguous in the language used with reference to these payments and to avoid all controversy on this point this paragraph will be stricken out and a paragraph in accordance with the allegations of the petition and the proof will be inserted as follows:

"As alleged in the petition plaintiff completed and delivered to defendant certain of said turbine equipment under the said Standifer contract, and was paid therefor the sum of $78,220 'in accordance with said Standifer contract.' This sum was paid in the following manner: The Fleet Corporation paid plaintiff $1,700 on account of two pumps having been completed and delivered to it by plaintiff on the Standifer contract; also paid plaintiff, in three installments, $64,620 on account of a geared marine turbine having been completed and delivered under the Standifer contract; and $11,900 on account of fourteen other pumps having been completed and delivered under the Standifer contract."

In the former opinion the court held, following the *Russell Motor Car Co. case*, that:

"In fixing just compensation the court must consider the value of the contract at the time of its cancellation, * * *."

Accordingly, in Finding XVI the value was fixed at $8,500. Counsel for plaintiff complain of this figure as insignificant and erroneous, and endeavor to demonstrate this by including under it other matters than that to which the court applied it. In the former opinion the court stated that in fixing this amount prospective profits were not included. Necessarily, outside of such profits, the value of the contracts to plaintiff was quite small and we have no occasion to change our former finding.

The plaintiff has also filed a motion for Special Findings of Fact under Rule 57. There are many reasons why this motion should not be granted. In the first place plaintiff asked for findings of fact when the case was submitted to the commissioner, and in its brief on the submission of the case to the court stated that the commissioner's findings were in accord with the evidence and, that with change in the amounts in Findings XXXVII and XL and allowance of interest to date of payment, should be adopted by the court. Rule 57 only applies when special findings of fact are not "requested at the time the case is submitted." Plaintiff had already made this request; its findings had been considered and were as to the greater part thereof adopted by the court in the Special Findings of Fact which accompanied the opinion. As the court still retains the same view as to what the findings of fact should be, any further findings of fact (except as to two matters hereinafter stated) would simply be a repetition of those already found and stated. That no purpose would be subserved by such action is apparent.

Many findings asked by plaintiff were omitted by the court but the reason ought to be plain. It is that such findings largely consist of conclusions of law sometimes mingled with matter which in the judgment of the court was entirely irrelevant or immaterial to the case. An examination of the findings requested by plaintiff will show that the principal thing sought is that the court should state in the findings legal conclusions not only that the plaintiff has a claim for just compensation, but the manner in which this computation shall be determined and the amount thereof. The commissioner made such a finding, and stated therein that just compensation included the amount of profits which the plaintiff would have made on the contracts, which he computed accordingly. But the determination of whether such profits were a part of just compensation in the case at bar is clearly a conclusion of law and has no place in the findings of fact. The court found the amount of such profits, which it included in the Special Findings of Fact, but its conclusion of law that such profits should be excluded from the amount of plain-

tiff's recovery was expressed in the opinion and judgment, which is manifestly where it belongs. This was not the only conclusion of law which plaintiff seeks to have incorporated in the Special Findings of Fact, but it would take too much space to recapitulate the others.

In one respect, plaintiff's motion for Special Findings of Fact will be granted. It is asked that the dates when the contracts were entered into be shown and as these dates are indirectly referred to in the opinion, this request seems to be proper. Accordingly, Finding II will be amended by the addition of the following:

"A copy of the Standifer contract is attached to the petition and marked 'Exhibit B-1'; copies of the Turbine Equipment-Luckenbach contracts are attached to the petition and marked 'Exhibit C-1' and 'Exhibit C-3'; and a copy of the Supple & Ballin contract is attached to the petition and marked 'Exhibit A-1.' These contracts are made part of this finding by reference to said exhibits."

Also, on the court's own motion, the order amending the findings will include an amendment to Finding X in manner and form as has been hereinbefore stated.

Plaintiff, having before submission of the case, requested Special Findings of Fact and on the submission presented the same to the court for determination, and the court having made Special Findings of Fact as a basis for its opinion and judgment, the motion for Special Findings of Fact will be overruled except in so far as to amend the Special Findings of Fact heretofore made with respect to the matters specified above, and the motion for new trial will also be overruled. An order will be entered accordingly.

Williams, *Judge;* Littleton, *Judge;* and Booth, *Chief Justice*, concur.

Whaley, *Judge*, did not hear this case originally and took no part in this decision.

DUNBAR & SULLIVAN DREDGING CO. v. THE UNITED STATES

[No. H-78. Decided April 30, 1930. Motion for new trial overruled December 1, 1930.]

On the Proofs

Contract for dredging; scow measurement; measurement in place; conversion formula; overdepth dredging.—Plaintiff's contract with the Government for dredging provided for payment on basis of scow measurement, with the provision that "when necessary for any cause to convert 'scow measurement' into 'place measurement' or the reverse, 100 yards of the former will be taken as the equivalent of 85 yards of the latter." The contract construed, and *held*, that this provision did not authorize place measurement merely because it turned out to be a more accurate method of measurement, but where in ascertaining overdepth dredging, for which the contractor was not entitled to compensation, the quantity overdredged could only be ascertained by measurement in place, such measurement was authorized, the amount deductible, however, to be computed by the use of the ratio specified.

The Reporter's statement of the case:

Mr. Ralph Ulsh for the plaintiff. *Slee, O'Brian, Hellings & Ulsh* were on the briefs.

Mr. P. M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is now, and was during all of the times hereinafter mentioned, a corporation organized under the laws of the State of New York, with its principal office at Buffalo, New York, and an operating office in the city of Detroit, and engaged in the business of a marine dredging contractor.

II. By an advertisement dated March 31, 1925, the United States Government, through the United States Engineer Office, Detroit, Michigan, invited proposals for the dredging of the westerly 400 feet of the 800-foot ship channel at the south end of Lake Huron to a depth of 22 feet, which pro-

posals were to be submitted on or before April 30, 1925. Said advertisement provided that

"The material to be removed is believed to be mainly soft clay, but in places stiff to hard, with imbedded small stones or boulders. Bidders are expected to examine the work and decide for themselves as to its character, and to make their bids accordingly, as the United States does not guarantee the accuracy of this description."

also

"Proposals will be received for scow measurement and for place measurement, either or both, at the option of the bidder."

also

"When necessary for any cause to convert 'scow measurement' into 'place measurement,' or the reverse, 100 yards of the former will be taken as the equivalent of 85 yards of the latter."

III. Under date of April 30, 1925, the Dunbar & Sullivan Dredging Company, plaintiff herein, submitted a written proposal to the district engineer, United States Engineer Office, Detroit, Michigan, for dredging ship channel at the south end of Lake Huron, Michigan, and to furnish all machinery, plant, labor, and supplies, and to do the specified work at 40¢ per cubic yard, scow measurement.

IV. Under date of May 19, 1925, the Dunbar & Sullivan Dredging Company and the Government of the United States, represented by Lieut. Colonel E. J. Dent, Corps of Engineers, United States Army, entered into a formal written contract, by the terms of which plaintiff obligated itself to furnish all machinery, plant, labor, and supplies, and to do the specified work of dredging ship channel, south end of Lake Huron, Michigan, at the rate of 40¢ per cubic yard, scow measurement. Attached to and made a part of the contract were detailed specifications providing in part as follows:

"When necessary for any cause to convert 'scow measurement' into 'place measurement' or the reverse, 100 yards of the former will be taken as the equivalent of 85 yards of the latter."

The advertisement and proposal were made a part of the contract. A copy of said contract is attached to the petition, marked "Exhibit A," and is made a part hereof by reference.

V. Plaintiff commenced work under the contract on or about June 17, 1925, and thereafter prosecuted the work to completion, and duly performed all the conditions of the contract by it to be performed, completing the work on October 27, 1925. At and before the time the contract was entered into, and the work undertaken, it was believed both by the defendant and the plaintiff that the materials to be excavated were mainly soft clay, but in places stiff to hard with imbedded small stones or boulders. Plaintiff had not excavated before in that locality and made no examination to determine the nature of the materials to be removed.

VI. The easterly 400 feet of the ship channel, contiguous longitudinally with the work performed by plaintiff, was dredged simultaneously by the Duluth Superior Dredging Company under a plant rental contract with the Government. This contract was let prior to the letting of the plaintiff's contract, and the work was commenced after the plaintiff's contract was let but about thirty days before plaintiff commenced work under its contract. Plaintiff had been familiar with the dredging work in the vicinity for a number of years.

VII. Immediately after the plaintiff commenced work it was discovered that the material being excavated was a stiff clay which when removed retained the shape of the dredge dipper when deposited in the scows and stacked up like large rocks which did not flow together when loaded and seek a level, but created voids between the masses of clay and around the sides of the scow pockets, of irregular and undeterminable size. It was impossible to load the scows full because these rocklike masses of clay would bridge and bind so as to prevent dumping through the bottom of the scows.

VIII. The plaintiff employed on the work a dredge having a dipper with a capacity of 6 cubic yards and during part of the work an additional dredge with a 3½-yard dipper. Four scows were used, two of which had a capacity of 800 yards, and two of 600 yards. These scows were

divided into six pockets, each of which was approximately 16 feet long, 24 feet wide at the top, sloping at the sides to a width of 10 feet at the bottom where the doors opened outwardly for dumping.

IX. The Government employed inspectors for the purpose of determining the quantity of material excavated by observing the loading of the scows and estimating and recording the extent to which the scows were loaded, the capacities of the scows having been previously determined. The inspectors were qualified and intelligent, painstaking and careful, did the work to the best of their ability, and made their measurements in the presence of plaintiff's representatives. No protest or complaint, written or oral, was made by the contractor or his duly accredited representative before any scow was moved away from the dredge with respect to the measurement of the load and the determination of the cubic yardage therein, nor was any request for remeasuring made by the contractor or his representative while the work was in progress.

X. During the progress of the work the Government engineers submitted to the plaintiff monthly estimates purporting to show the quantity of materials excavated upon the basis of which payments were made on account. The quantities contained in these monthly estimates were the quantities shown by the estimates of Government inspectors as determined by scow measurement.

Plaintiff made no protest as to the quantity of materials determined by the Government inspectors and set forth in the monthly estimates.

XI. Shortly after the plaintiff commenced work or some time in June, 1925, it was discovered that on account of the character of materials, the quantities excavated could not be accurately measured or determined in the scows, and the contracting officer at Detroit, in charge of the work, invited the president of plaintiff company to call at the office and discuss the question of the difficulty of measuring the material in the scows. Plaintiff's president promptly called at the United States engineer office in response to this invitation, and at this conference the question of measurement was fully

discussed but no understanding was reached by the parties. The contracting officer suggested that on account of the difficulty that was encountered in using the scow measurement, the company should agree to a change in the contract authorizing place measurement with the ratio prescribed in the specifications. Plaintiff's president expressed satisfaction with the use of scow measurement and contended that it was not necessary to ask that the contract be changed because the contract as written and signed authorized the alternative use of place measurement. Plaintiff did not at any time ask that the contract be changed authorizing place measurement and nothing further was said about it by either of the parties until the work was completed.

There is no proof of fraud or collusion in the making of the scow measurements and estimates based thereon, nor does it satisfactorily appear that there was any obvious error connected therewith.

XII. At the conclusion of the work the Government engineers made up a final estimate purporting to show the total quantity, scow measurement, excavated by the plaintiff under the contract. This final estimate showed a total gross excavation, scow measurement, amounting to 380,663 cubic yards. From this amount the Government engineers deducted 75,158 cubic yards, scow measurement, for overdepth nonpay dredging, determined by applying the ratio of 95.2 to 100 to the 71,558 cubic yards, place measurement, overdepth dredging, ascertained from actual surveys. The net amount of excavation as thus determined by the Government engineers was 305,505 cubic yards. A final estimate was sent to plaintiff based upon these quantities, which final estimate plaintiff signed under protest, claiming for the first time that the quantity of excavation thus determined was incorrect and short of the actual excavation performed under the contract, and that plaintiff was entitled to have the quantity of excavated material determined by converting ascertained place measurement into scow measurement at the ratio of 85 to 100. Based upon the final estimate as prepared by the Government engineers there was due plaintiff the sum of $7,352.40, plus $4.00 for meals furnished by

plaintiff to Government inspectors, or a total of $7,356.40. A voucher for said amount was certified to the General Accounting Office for direct settlement, and under date of April 23, 1926, the Comptroller General determined that the sum of $3,741.20 was the amount due, and sent plaintiff a check for said amount, which check was refused by plaintiff. The Comptroller General determined that the overdepth dredging amounted to 84,186 cubic yards, and deducted this amount from 380,663 cubic yards, leaving a balance of 296,477 cubic yards, which at 40¢ per cubic yard amounted to the sum of $118,590.80. Plaintiff had been paid the sum of $114,849.60, leaving the amount due under the Comptroller General's determination, $3,741.20. The overdepth yardage was arrived at by the Comptroller General by converting the actual quantity of overdepth material excavated as ascertained by place measurement into scow measurement at the ratio of 85 to 100.

XIII. During the course of the work, and after its completion, the Government engineers made surveys of the site by which it was determined that the gross quantity of material excavated by the plaintiff was 362,432 cubic yards, place measurement, and the overdepth material was 71,558 cubic yards, place measurement. Deducting the overdepth nonpay dredging from the gross quantity of material excavated leaves 290,874 cubic yards, place measurement. Applying the conversion ratio of 85 to 100 to this amount shows the amount of pay material excavated by the plaintiff to be 342,204 cubic yards, scow measurement, which at 40¢ per cubic yard amounts to $136,881.60, of which $114,849.60 has been paid. On this basis there is due the plaintiff the sum of $22,032.00.

The plaintiff knew that the said surveys were being made, but made no request or demand for the results thereof, nor did the Government furnish them to plaintiff before the completion of the work.

XIV. For soft materials such as were expected to be encountered in the performance of plaintiff's contract the normal rate of swell in excavation is 85 to 100, that is, 85 yards measured in place in the bank will swell to equal 100

yards when loaded in a scow, as shown by engineering experience.

The court decided that plaintiff was entitled to recover $3,741.20.

GRAHAM, *Judge*, delivered the opinion of the court:

This suit grew out of a formal written contract between the plaintiff and the defendant under which the plaintiff agreed to do certain dredging at a fixed price per cubic yard, compensation to be computed on the basis of scow measurement and not place measurement; that is to say, the material excavated was to be dumped into scows and thereafter measured in the scows.

The contract provided that the scow measurement was to be made by the defendant's inspectors and monthly payments were to be made on the basis of the estimates based upon these measurements. These measurements were regularly made and upon estimates based thereon payments were regularly made to the contractor and accepted without protest until the contract was completed and the final payment and settlement reached.

Paragraph 31 provided:

"* * * the final acceptance of the whole or a part of the work and the deductions or corrections of deductions made thereon will not be reopened, after having once been made, except on evidence of collusion, fraud, or obvious error, * * *."

At this point the plaintiff asserted that the scow measurements were not accurate and insisted that on account of obvious error disclosed by certain discrepancies between the scow measurements and the place measurements by the Government surveyors it was entitled to a larger recovery than shown by the scow measurements. It appears that the scow measurements were reasonably accurate. But however this may be, the contract provided for scow measurements. It appears by the findings that there was no bad faith or carelessness in the making of the scow measurements by the Government inspectors. They were made in the presence of the plaintiff's representatives, and no pro-

test was made or objection raised, and payment from time to time based upon them accepted.

During the progress of the work the Government engineers submitted to the plaintiff monthly estimates purporting to show the quantity of materials excavated upon the basis of which payments were made on account. The quantities contained in these monthly estimates were the quantities shown by the estimates of Government inspectors as determined by scow measurement.

It appears from the findings that there was no obvious error in the estimate based on scow measurement.

Under these facts the case is controlled by the decisions of this court in *Joice* v. *United States*, 51 C. Cls. 439, and *Poole Engineering Co.* v. *United States*, 57 C. Cls. 232, 236.

Plaintiff is asking for the rejection of scow measurements and the substitution therefor of place measurements after the work had been completed, despite the fact that the contract called for a settlement on the basis of scow measurement. There is nothing in the contract which authorizes or in the findings which justifies a settlement upon the basis of place measurement.

Paragraph 43 of the specifications further provided that—

"If the contractor considers any * * * ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions or decision immediately and then file a written protest with the contracting officer against the same within 5 days thereafter, or be considered as having accepted the record or ruling."

This requirement the plaintiff failed to observe.

Paragraph 7 of the contract provided that—

"No claim whatever shall at any time be made upon the United States by the contractor for or on account of any extra work or material performed or furnished * * * and not expressly bargained for."

We hold that the Government is only liable for payment to the contractor, aside from the question of overdepth and side-slope dredging which will be discussed later, upon the basis of scow measurements found by the inspectors and

at the rate fixed per cubic yard for such measurements by the contract.

The contract provided that the contractor should not be entitled to compensation for overdepth dredging in excess of 2 feet below the 22 feet required by the contract, nor for any excess side-slope dredging.

At the conclusion of the work the Government engineers made up a final estimate showing the total quantity, scow measurement, excavated by the plaintiff under the contract. This final estimate showed a total gross excavation, scow measurement, amounting to 380,663 cubic yards. The estimated overdepth dredging by actual surveys, place measurement, amounted to 71,558 cubic yards, which, under the contract, was to be deducted from the total scow measurement on the basis of 100 scow measurement to 85 place measurement. Taking this 71,558 cubic yards, place measurement, the Government engineers for some unexplained reason, instead of applying the ratio of 85 place to 100 scow measurement, provided in the contract, applied a ratio of 95.2 place to 100 scow measurement, which showed 75,158 cubic yards to be deducted from the total scow measurement of 380,663 cubic yards, leaving a balance of 305,505 cubic yards to be settled for with the plaintiff, and upon this basis there was due the plaintiff, at 40 cents a cubic yard, $122,202. The plaintiff had been paid the sum of $114,-849.60, thus leaving a balance due on final settlement of $7,352.40, plus $4 for meals furnished Government inspectors, making a total of $7,356.40. A voucher for this amount was certified to the accounting office for direct settlement. The Comptroller General refused to pay the voucher, holding that under the terms of the contract the deduction for overdepth dredging should be according to the terms of the contract, which was 85 place to 100 scow measurement, instead of 95.2 place to 100 scow measurement used in the settlement by the Government engineers. Taking this basis for calculating overdepth dredging in place, the amount to be deducted would be 84,186 cubic yards, which, deducted from the said total amount dredged, 380,663, left a balance to be settled for of 296,477 cubic yards, which at 40 cents

a cubic yard amounted to $118,590.80. Deducting the sum of $114,849.60 previously paid by the Government, there was due the plaintiff under the comptroller's determination, the sum of $3,741.20. A check for this amount was made out and sent to the plaintiff, which the plaintiff refused to accept.

We are of opinion that this settlement of the comptroller was correct and in accordance with the provisions of the contract. The plaintiff, therefore, is entitled to recover said amount, $3,741.20, and for it judgment should be entered.

WILLIAMS, *Judge*, and LITTLETON, *Judge*, did not hear this case and took no part in the decision.

GREEN, *Judge*, and BOOTH, *Chief Justice*, concur.

SAYERS & SCOVILL COMPANY v. THE UNITED STATES

[No. J-563. Decided April 30, 1930. Motion for new trial overruled October 20, 1930]

On the Proofs

Excise taxes; combination hearses and ambulances; automobiles; sec. 900, revenue acts of 1918 and 1921.—Motor-propelled vehicles sold by the manufacturer with accessories and auxiliary equipment purchased by it from other manufacturers as and when needed, upon installation of which they were usable as ambulances, and without which they were admittedly hearses, *held* subject to taxation as automobiles other than automobile trucks and automobile wagons, sec. 900, revenue acts of 1918 and 1921.

The Reporter's statement of the case:

Mr. George M. Wilmeth for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant. *Mr. Charles F. Kincheloe* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff was from January, 1920, to February, 1923, and now is, a corporation organized, existing, and operating

under and by virtue of the laws of the State of Ohio, with its principal place of business located at Cincinnati, Ohio.

II. From January, 1920, to February, 1923, the plaintiff was engaged in the manufacture and sale of motor-propelled hearses, ambulances, limousines, combination hearses and ambulances and passenger cars.

The combination hearses and ambulances were so designed and constructed that they could be and were used as hearses, or by the installation and use of certain accessories and auxiliary equipment furnished and sold therewith by plaintiff, such hearses became adaptable for use, and were used, as ambulances.

The accessories and auxiliary equipment required to make and constitute these vehicle ambulances were not manufactured by the plaintiff but were purchased by it from other manufacturers, as and when needed. These vehicles, without the accessories and extra equipment, admittedly are hearses.

The said accessories and extra equipment consisted of cots and seats which fit into sockets which are designed and placed in said vehicles or hearses for the attachment and use of such accessories and extra equipment.

The number of combination hearses and ambulances manufactured and sold by the plaintiff during the time above stated amounted to about 3 per cent of the number of hearses manufactured and sold by it during such time.

III. For the period January, 1920, to February, 1923, inclusive, plaintiff filed returns and paid taxes on sales of such motor combination hearses and ambulances, fitted with the accessories above described, at the rate of 3 per cent of the selling price.

Subsequently the Bureau of Internal Revenue held that vehicles sold with the equipment herein described were taxable at the rate of 5 per cent and assessed additional taxes on sales of such for the period January, 1920, to February, 1923, inclusive, which taxes together with penalties and interest amounted to $2,434.84.

The additional taxes, penalties, and interest thus assessed were paid by plaintiff on July 23, 1923. On September 16,

1925, plaintiff filed claim for refund of said sum of $2,434.84, which claim was duly rejected by the Commissioner of Internal Revenue on July 22, 1926.

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff seeks to recover the sum of $2,434.84, which it is alleged, was wrongfully assessed and collected as excise taxes under section 900 of the revenue acts of 1918 and 1921. The taxes were levied and collected on the manufacture and sale by the plaintiff, during the period from January, 1920, to February, 1923, of certain motor-propelled combination hearses and ambulances.

The question to be determined is whether such motor-propelled vehicles are subject to the 3 per cent tax imposed by subdivision (1) section 900, in the respective revenue acts of 1918 and 1921, or at the rate of 5 per cent tax imposed by subdivision (2) thereof.

The plaintiff during the time in question was engaged in the business of manufacturing and selling hearses, ambulances, limousines, passenger cars, and combination hearses and ambulances.

The taxes in question were levied on the manufacture and sale by the plaintiff of combination hearses and ambulances, there being no question raised as to the taxes assessed and collected on hearses and ambulances manufactured and sold as such respectively.

The vehicles on which the taxes sought to be recovered were collected, were designed, and constructed in such manner that they were adaptable for use, and were used by those to whom they were sold as either hearses, or ambulances, or both hearses and ambulances.

Section 900 of the revenue act of 1918 (40 Stat. 1122) provided:

"That there shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold

on or in connection therewith or with the sale thereof), 3 per centum;

"(2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum; * * *"

(The provisions of section 900 of the revenue act of 1921 are identical.)

Pertinent articles of Regulations No. 47, promulgated by the Treasury Department for the proper administration of these acts, are:

"ART. 11. *Automobiles; Scope of tax.*—An automobile truck, automobile wagon, or other automobile is a self-propelling vehicle designed to transport along highways and roads persons or property or both.

"Where such vehicle is capable of transporting both property and persons, the primary use for which it is designed will control as to whether it is taxable at 3 per cent under subdivision (1) as an automobile truck or automobile wagon, or at 5 per cent under subdivision (2) as an 'other automobile.'

* * * * *

"ART. 12. *Automobile trucks and automobile wagons.*—The tax is 3 per cent of the price for which automobile trucks and automobile wagons are sold by the manufacturer. It applies to automobile trucks and automobile wagons primarily designed or adapted for transportation of property along highways and roads, although persons may incidentally be transported at the same time, * * *. Automobile hearses are taxable as automobile trucks or automobile wagons.

* * * * *

"ART. 13. *Other automobiles and motor cycles.*—The tax is 5 per cent of the price for which such articles are sold by the manufacturer. It applies to automobiles primarily designed for carrying persons, although property may incidentally be transported at the same time, as outlined in article 11, and to other automobile chassis as defined in article 15. * * *

"Automobiles that are designed and primarily adapted for the transportation of persons as distinguished from property, are taxable as 'other automobiles': For example, * * * ambulances * * *."

Under article 13 of Regulation No. 47 ambulances are taxable under subdivision (2) at the rate of 5 per cent of

the sales price. Automobile hearses under article 12 are taxable at the rate of 3 per cent.

The plaintiff in its returns made monthly for the period from January, 1920, to February, 1923, inclusive, reported its sales of such combination hearses and ambulances as sales of hearses, and paid taxes thereon at the rate of 3 per cent. The commissioner later held that the proper rate on the sales of such vehicles is 5 per cent and assessed and collected the additional taxes in question.

The provisions of the regulations that hearses are taxable at a rate of 3 per cent and ambulances at a rate of 5 per cent are reasonable and seem to be a correct interpretation of the statutes imposing these taxes. The plaintiff does not contend that ambulances, as such, are not properly taxable at the 5 per cent rate. It does contend, however, that the vehicles in question can not be properly classified as ambulances. It is urged that they are designed, manufactured, and sold primarily for use as hearses, and that this is controlling in determining the applicable tax rate; that their use as ambulances is secondary and incidental to the primary purpose for which they are intended, and in fact used; that as sold by the plaintiff they are hearses and not ambulances.

Unfortunately for the plaintiff's contention, it has stipulated (page 2, typewritten record of the evidence) that the motor vehicles in question are combination hearses and ambulances. The court is bound by this stipulation and has found the facts accordingly. They are manufactured and sold as combination hearses and ambulances.

If they are ambulances they are none the less so because they can be and are also used for other purposes. These vehicles as sold and delivered by the plaintiff to its customers are completely equipped ambulances in every sense of the word. Before they can be used as hearses it is necessary to remove the accessories and ambulance equipment with which they are provided when delivered to purchasers.

We think the decision of the commissioner that such motor-propelled combination hearses and ambulances are prop-

erly subject to the tax at the rate of 5 per cent under the provisions of the revenue acts of 1918 and 1921 is correct.

The plaintiff's petition should be dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

V. H. KENDALL, TRUSTEE IN BANKRUPTCY, MICHIGAN MOTOR SPECIALTIES CO., v. THE UNITED STATES

[No. D-6. Decided June 2, 1930]

On the Proofs

Dent Act; informal contract; absence of authorized agency.—The Purchasing Bureau of Small Arms and Ammunition Manufacturers, created by the Ordnance Department, U. S. Army, shortly after the outbreak of war in 1917, for the purpose of negotiating contracts on behalf of manufacturers of small arms and ammunition with those who desired to supply materials to them, was not an authorized agent of the United States, and an informal contract made therewith did not bind the Government under the Dent Act.

Contracts; approval and acceptance by inspector; review of decision.—Where a contract provides that the articles manufactured shall be subject to the approval and acceptance of a Government inspector, the judgment of the inspector is final and will not be reviewed except for fraud, mistake or negligence so gross as to imply bad faith.

The Reporter's statement of the case:

Mr. Ashby Williams for the plaintiff. *Mr. Joseph Fairbanks* was on the brief.

Mr. James A. Cosgrove, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Arthur Cobb* was on the brief.

The court made special findings of fact, as follows:

I. The Michigan Motor Specialties Company is a corporation organized under the laws of the State of Michigan with

its principal office at Detroit in said State. On December 20th, 1921, the said corporation was adjudged a bankrupt by an order of the district court of the United States for the eastern district of Michigan, southern division.

II. On February 7th, 1922, by an order of said district court, the plaintiff, V. H. Kendall, was appointed sole trustee in bankruptcy of said bankrupt corporation; and on December 11th, 1923, the said plaintiff was authorized and directed by an order of said district court to institute and prosecute this suit.

III. Shortly after the outbreak of the war in 1917, the Ordnance Department created, at 50 East 42nd Street, New York, an organization known as the Purchasing Bureau of Small Arms and Ammunition Manufacturers. The original purpose was the negotiating of contracts on behalf of those who were engaged in the manufacture of small arms and ammunition with those who desired to supply materials to them. After a short experience, however, this bureau engaged in negotiating and entering into contracts with small-arms and ammunition manufacturers on behalf of the United States.

IV. On July 12, 1917, the Purchasing Bureau of the Small Arms and Ammunition Manufacturers issued circular advertisement proposal No. 63, calling for bids for the furnishing of clips for caliber .30 ball cartridges, and the plaintiff made a bid on the form furnished at 1.2¢ per clip with delivery to start on September 15th, 1917, 200,000 clips per day to be delivered.

It was stated in circular proposal No. 63 that—

"The material to be purchased in accordance with this advertisement is to be used by U. S. Government contracts for distribution to and for sole liability of any one or more of the concerns represented by the bureau, and individual company's orders will be issued accordingly."

V. On July 20, 1917, the plaintiff wrote a letter to the Purchasing Bureau of the Small Arms and Ammunition Manufacturers in which he offered to furnish and deliver 65,000,000 of the articles referred to in circular No. 63 at the price stated therein, according to the conditions, specifications, and requirements in the advertisement.

VI. On July 25, 1917, the following letter was written to the plaintiff:

PURCHASING BUREAU OF SMALL ARMS & AMMUNITION MANUFACTURERS, 50 EAST 42ND STREET

Peters Cartridge Co., Cincinnati, Ohio.
Remington Arms Co., of Delaware, Eddystone, Pa.
Remington Arms U. M. C. Co., Bridgeport, Conn.
Remington Arms U. M. C. Co., Ilion, N. Y.
Western Cartridge Co., East Alton, Ill.
Winchester Repeating Arms Co., New Haven, Conn.

NEW YORK, *July 25, 1917.*

MICHIGAN MOTOR SPECIALTIES Co.,
Detroit, Mich.

GENTLEMEN: You are advised that award is made for a minimum quantity of twenty-two and one-half million cartridge clips applying against Proposal No. 63, with the option of increasing this quantity up to 63,000,000.

The tentative production schedule required of you to cover the minimum quantity named above is as follows:

Sept	2, 500, 000
Oct	3, 000, 000
Nov	3, 000, 000
Dec	3, 000, 000
Jan	3, 000, 000
Feb	3, 000, 000
Mar	3, 000, 000
Apr	2, 000, 000

Shipping instructions will be furnished in the near future, indicating the destination or destinations to which your finished material will be forwarded.

Contract for the quantity allotted to you will be made between the cartridge concerns represented by this bureau and yourselves. We will prepare, for your acceptance and signature, the contracts.

In the meantime, please accept this letter as authority to proceed immediately with the necessary work for the production of the clips.

It is essential that the schedule given above be carried out.

It is desirable for us to know immediately the amount of copper and spelter which you will require for the manufacture of the necessary brass to cover your contract. Will you please, therefore, communicate immediately with your brass rolling mill and determine these quantities, as well as

the schedule of the deliveries necessary, and advise us, giving us the shipping instructions for such materials?

Respectfully,

By direction of—

O. B. MITCHAM, *Col., Ord. Dept.,*
Chairman of Committee.

By HARRY C. CRYDER,
1st Lieut., Ord. Dept., O. R. C.

VII. On August 21, 1917, the following letter was written to the plaintiff:

NEW YORK, *August 21, 1917.*

MICHIGAN MOTOR SPECIALTIES COMPANY,
26–40 Du Bois Street, Detroit, Michigan.

GENTLEMEN: Referring to order for clips for .30 ball cartridges, the contracts covering the amount required from you are being prepared and will be forwarded to you for signature. The contracts will be subject to the President's proclamation of March 24th, 1917, suspending the eight-hour day statute, upon the conditions therein expressed. They will further require faithful performance bond, with acceptable surety, to the amount of 10% of the total contract price. The contracts will also include a cancellation clause with provision for compensation to you and for net expenditures and outstanding obligations for labor and materials in respect of clips not manufactured in the event of such cancellation.

Time being an important factor in the delivery of these clips, I am requesting you to start their manufacture and delivery pending signing of such contract. I understand that you will proceed with the manufacture and shipment of clips as ordered by me, the same to be in strict accordance with United States Government drawings and specifications. Copy of said drawings and specifications are hereto annexed. All clips to be packed in wooden packing boxes furnished by you, with your name and the number of clips plainly marked on each box. Price to be . . . twelve (12) dollars per thousand.

Delivery point f. o. b. Detroit, Michigan.

All clips will be subject to inspection by the proper officers, or agents of the Ordnance Department, United States Army.

Below is the allotment for shipment to the following companies in the months specified, according to the above prices and conditions:

		Name	Address
September	2, 500, 000	Remington Arms UMC Co	Bridgeport, Conn.
October	3, 000, 000	Winchester Repeating Arms Co	New Haven, Conn.
November	3, 000, 000	Winchester Repeating Arms Co	New Haven, Conn.

Bills for the above clips are to be made out in triplicate, being forwarded to this bureau.

Your acknowledgment of this letter is requested.

Respectfully,

By direction of—

O. B. MITCHAM, *Col., U. S. Army (retired),*
Chairman of Committee.

By HARRY C. CRYDER,
1st Lieut., Ord. Dept., U. S. R.

HCC:RA.

VIII. On August 24, 1917, the following letter was written to the plaintiff:

NEW YORK, *August 24, 1917.*

MICHIGAN MOTOR SPECIALTIES COMPANY,
26 Du Bois Street, Detroit, Michigan.

GENTLEMEN: We have yours of the 20th inst. making inquiry regarding certain manufacturing details of cartridge clips.

With this we enclose sample of cartridge clip from the Frankford Arsenal.

Frankford Arsenal, under date of July 19, in the matter of mixture of zinc and copper for the brass used for clips, advised us as follows:

"The best brass for this purpose has been found to contain copper 66½% to 69½%; zinc 30½% to 33½%. One of the most important factors is that this brass shall be rolled to give the required stiffness."

Specifications for the U. S. caliber .30 rifle cartridges, Model 1906, provide as follows:

"The ball cartridges will be assembled in clips of the design shown on the drawings. Samples of these clips showing the grade of material used, the security with which the cartridges are held therein, and the ease by which they are fed therefrom will be supplied by the Ordnance Department as standards to which the clips furnished must conform. On the approval of the Chief of Ordnance, an acceptable clip may be substituted in lieu of the above."

Specifications on manufacture of cartridge metal for small-arms ammunition, No. 536, provide as follows:

"Drawing brass for clip bodies: 0.02–0.0005 inch thick; 2.435 to 2.437 inches wide. In coils, approximately 9 inches in diameter, having a 4-inch hole, and weighing 40 lbs. Must be of such composition and temper as to satisfactorily produce the article manufactured. Sample will be furnished on request.

"Working test.—The allowable loss due to defective metal is 2%. Unsatisfactory metal fails to take the re-

quired form without breaking at the folds or indents. Spring brass for clip springs: 0.01–0.0005 inch thick; 0.510 to 0.512 inch wide. In coils, approximately 1 inch in diameter, having a 4-inch hole, and weighing 10 pounds. Must be of such composition and temper as to satisfactorily produce the article manufactured. Sample will be furnished on request.

"Working test.—The allowable loss due to defective metal is 2 per cent. Coils which tend to form spirals when unrolled so that the spring when formed will be warped will be rejected."

We are advising you to-day regarding Frankford meeting, to which please bring the above specifications.

We have to ask that you supply this bureau with 100 clips as first produced, which will fairly represent your first run. These will be submitted to Frankford Arsenal for approval in writing.

Please acknowledge the receipt hereof.

Respectfully,

By direction of—

O. B. MITCHAM, *Col., U. S. Army (retired)*,
Chairman of Committee.

By HARRY C. CRYDER,
1st Lieut., Ord. Dept., U. S. R.

WWB.M.

IX. Acting on the request of Colonel Mitcham, the plaintiff began immediately to make preparations to manufacture the cartridges and perform the contract. Dies were manufactured and machines installed in its plant. Efforts were begun to secure the brass with which to manufacture the clips. A visit was made to the Frankford Arsenal and samples of sheet brass were procured, which were represented to the plaintiff to be the kind proper for the manufacture of clips. The plaintiff took this sample of brass to the American Brass Company, and the American Brass Company manufactured and delivered to the plaintiff on September 25, 1917, a sample of brass, which was represented to plaintiff as being of the same temper as that furnished by the arsenal, which was known and designated in the trade as No. 2, or ½ hard, brass. Another shipment of the same temper of brass was made by the American Brass Company on October 8, 1917. From this temper of brass the plaintiff made some cartridge clips and submitted them to the Government inspector at the plant, who

rejected them as being too soft. The plaintiff then procured No. 3, or ¾ hard, brass, and from this temper of brass made some clips, which were likewise rejected by the defendant's inspector as being too soft, and the plaintiff then procured No. 4 hard brass from which to manufacture the clips.

X. The plaintiff proceeded about the middle of November, 1917, to go into the production of clips from No. 4 hard brass. By the end of November, 1917, about 100,000 clips of No. 4 metal had been manufactured. There was no Government inspector at the plant at that time. About the last of November, 1917, the plaintiff submitted to the Frankford Arsenal 100 cartridge clips made from No. 4 temper brass and some clips from No. 2 hard brass. The clips made from No. 2 were rejected as being too soft. The clips made from No. 4 brass were approved by the civilian foreman of the small-arms department, double press room of the Frankford Arsenal, not only with respect to measurements and dimensions, but also to the temper of brass from which they were manufactured. No written approval was sent by the Frankford Arsenal of its inspection and approval.

XI. After the cartridge clips manufactured from No. 4 temper brass had been orally approved by the civilian foreman of small-arms department, double press room of the Frankford Arsenal, the plaintiff went into the production of cartridge clips out of that temper brass. By the latter part of December, 1917, several millions of the clips in the various stages of completion had been manufactured out of No. 4 temper brass. Subsequent to the departure of the Government inspector from the plant of the plaintiff, about the middle of November, 1917, no inspector was sent to the plant until an inspector arrived on December 24, 1917, and another on December 26, 1917. These inspectors on or about the 26th of December inspected the cartridge clips manufactured from No. 4 temper brass and declined to approve them on the ground that the clips manufactured from this material, after a lapse of time, began to spread at the rails as a result of the use of this hard material and required the plaintiff to secure the approval of the chief inspector

in Washington as to the temper of brass to be used before proceeding further.

XII. The plaintiff's president proceeded to Washington, and on January 1, 1918, had a conference with officers in charge of the Ordnance Department of the Army. A thorough test was made of sample cartridge clips submitted by plaintiff, by officials representing the Ordnance Department. The clips inspected were pronounced unsatisfactory and the plaintiff was advised that the brass used in the clips was of a too hard temper and that a different or softer material should be used in order to produce a clip that would properly function and pass inspection.

XIII. On January 5, 1918, a formal contract was entered into by and between the plaintiff, represented by its president, Mr. Charles W. Beck, and the defendant, represented by Colonel Charles Elliott Warren, of the Ordnance Department, United States Army, whereby the plaintiff agreed to manufacture and sell, and the defendant agreed to purchase 22,500,000 clips for caliber .30 cartridges at a unit price of 1.2 cents each, delivery to be made as follows:

January, 1918	1, 000, 000
February, 1918	4, 000, 000
March, 1918	4, 500, 000
April, 1918	4, 500, 000
May, 1918	4, 500, 000
June, 1918	4, 000, 000

The plaintiff manufactured and delivered to the defendant the cartridge clips provided for in this contract and was paid therefor by the defendant in full. Delivery of the clips under the contract was completed October 7, 1918.

XIV. After the conference in Washington in January, 1918, the plaintiff returned to the use of No. 2 brass in the manufacture of cartridge clips and out of that temper of brass completed and delivered to the Government on October 7, 1918, the remainder of the 22,500,000 cartridge clips, and the Government has paid in full the contract price of the cartridge clips.

XV. By reason of the various changes made by the plaintiff in its efforts to procure a brass of a proper temper out of which to manufacture clips that would pass the inspec-

tion of officers of the Ordnance Department of the Army, it made expenditures for labor, material, overhead factory costs, etc., of the sum of $29,807.80.

XVI. The plaintiff filed a claim before the Ordnance Claims Board, which was carried on appeal to the Board of Contract Adjustment, and relief was denied on April 3, 1920.

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff in this suit seeks to recover $29,807.80, damages for a breach by the defendant of an alleged informal contract, under the terms of which the plaintiff agreed to manufacture and sell, and the defendant agreed to buy, 22,500,000 cartridge clips at a unit price of 1.2 cents, or a total consideration of $270,000.

Plaintiff's claim being based on an informal contract, in order to recover the plaintiff must establish (1) that it had an informal contract with the defendant within the meaning of the act of March 2, 1919; (2) that the defendant has breached such contract, and that the damages sought to be recovered resulted directly from such breach; and (3) that the plaintiff within the time provided by law presented its claim to the Secretary of War for adjustment, and that the Secretary of War has failed or refused to make a satisfactory adjustment of the same.

On July 12, 1917, the Purchasing Bureau of Small Arms and Ammunition Manufacturers issued circular advertisement proposal No. 63, inviting bids from manufacturers on 179,858,000 clips for caliber .30 ball cartridges at a unit price of 1.2 cents each.

On July 20, 1917, the plaintiff addressed a letter to the Purchasing Bureau of Small Arms and Ammunition Manufacturers in answer to its circular advertisement and proposal No. 63, in which the plaintiff proposed to furnish and deliver 65,000,000 of the cartridge clips specified, at the price stated.

Opinion of the Court

On July 25, 1917, the Purchasing Bureau of Small Arms and Ammunition Manufacturers, through Colonel O. B. Mitcham, advised the plaintiff that in response to its bid an award was made it for a minimum quantity of 22,500,000 cartridge clips to be delivered as follows:

Sept	2,500,000
Oct	3,000,000
Nov	3,000,000
Dec	3,000,000
Jan	3,000,000
Feb	3,000,000
March	3,000,000
Apr	2,000,000

The Purchasing Bureau of Small Arms and Ammunition Manufacturers advised the plaintiff that the clips to be furnished should be in accordance with the United States Government drawings and specifications, copies of both of which were furnished to the plaintiff, and that all clips would be subject to inspection by the proper officers or agents of the Ordnance Department of the United States Army.

On August 24, 1917, the bureau furnished the plaintiff detailed specifications for clips and advised it fully as to the composition and physical qualities of brass from which satisfactory clips could be manufactured. The bureau also furnished the plaintiff with sample of cartridge clips from the Frankford Arsenal, and informed plaintiff in the matter of the mixture of zinc and copper for the brass used in the manufacture of such clips by the Frankford Arsenal.

The plaintiff after receiving the award for the manufacture of 22,500,000 clips commenced to make preparation to manufacture and furnish the same. It had not up to that time been engaged in the manufacture of clips and it therefore became necessary that it acquaint itself fully with the methods employed in such manufacture, and equip its plant with the necessary machinery and dies, and also to secure the quality and quantity of brass necessary for the manufacture of the clips. The Frankford Arsenal was visited and samples of the sheet brass used by the arsenal in the manufacture of clips were procured by the plaintiff. The plaintiff took this sample of brass to the American Brass Company,

which company manufactured and delivered to the plaintiff a sample of brass which was represented to be of the same temper as that furnished to it by the arsenal. From this temper of brass the plaintiff made some cartridge clips and submitted them to the Government inspector at its plant, who rejected them as being too soft. The plaintiff then procured another temper of brass, made some clips therefrom, which were likewise rejected by the inspector for the Government. The plaintiff thereupon procured another temper of brass and proceeded about the middle of November to the production of clips from which by the end of November it had produced about 100,000 clips. There being no Government inspector at its plant at the time, the plaintiff submitted about 100 of the cartridge clips to the Frankford Arsenal, which a civilian foreman of the double press room of the small arms department of Frankford Arsenal approved as being satisfactory. After the oral approval of the civilian foreman of the small arms department, the plaintiff proceeded with the manufacture of clips from brass of the temper of which the approved clips had been made, and by the latter part of December several million clips in various stages of completion had been manufactured out of such brass. During this time there was no Government inspector at the plaintiff's plant. Government inspectors, however, later arrived and on December 26 inspected such cartridge clips as had been completed and refused to approve them on the ground that the clips manufactured from this material after a lapse of time began to spread at the rails. The plaintiff's president shortly thereafter visited Washington, and took up with the officers of the Ordnance Department of the United States Army the difficulties it was having in producing clips that would meet the approval of the Government inspector. A thorough test was made of these clips by the inspector of small arms and accessories, Ordnance Department, Washington. They were found to be unsatisfactory and the plaintiff was advised that its manufacturing difficulties were due to the fact that the brass from which the clips were manufactured was too hard, and that a different or softer material should be used.

Opinion of the Court

On the 5th day of January, 1918, a formal contract was executed between the plaintiff company and the defendant for the production and purchase, respectively, of 22,500,000 cartridge clips, to be delivered as follows:

Jan., 1918	1,000,000
Feb., 1918	4,000,000
Mar., 1918	4,500,000
Apr., 1918	4,500,000
May, 1918	4,500,000
June, 1918	4,000,000

All the cartridge clips specified in this contract were manufactured and delivered to the defendant, and were accepted and paid for in accordance with the terms of the contract, and are in no way involved in this suit.

After its conference in Washington with officers of the Ordnance Department, the plaintiff company procured a softer temper of brass than that used in the cartridge clips which had been rejected, and proceeded with the manufacture and delivery of cartridge clips under the terms of its formal contract of January 5, 1918.

The plaintiff expended the sum of $29,807.80 for materials, labor, and other expenses in making changes in the different temper of brass used in the production of its cartridge clips, all of which is claimed to be a loss due to unnecessary changes required by agents of the defendant, it being contended that the temper of brass finally used was the same as that originally obtained and used by the plaintiff in the manufacture of clips which were rejected.

Plaintiff contends that it had two contracts with the defendant, each providing for the manufacture and sale to the defendant of 22,500,000 cartridge clips, the formal contract of January 5, 1918, which was reduced to writing, and all the terms of which were completely performed by each of the parties, and the informal agreement as originally made for the manufacture of 22,500,000 cartridge clips, which was not performed, but was breached by the defendant.

The question to be first determined is whether the informal contract upon which plaintiff's suit to recover is based was a contract between the plaintiff and the defend-

ant; or whether as claimed by the defendant it was a contract between the plaintiff and the Purchasing Bureau of Small Arms and Ammunition Manufacturers, a nongovernmental agency.

The Purchasing Bureau of Small Arms and Ammunition Manufacturers was an organization created by the Ordnance Department shortly after the outbreak of the war, with offices located at 50 East 42nd Street, New York City. The bureau was composed of small arms and ammunition manufacturers having munition contracts with the Government. The purpose of the organization was the negotiation of contracts on behalf of its members with persons who desired to supply materials to them.

In circular advertisement and proposal No. 63, issued by the Purchasing Bureau of Small Arms and Ammunition Manufacturers on July 12, 1917, it was specifically stated:

"The material to be purchased in accordance with this advertisement is to be used on U. S. Government contracts for distribution to and for sole liability of any one or more of the concerns represented by the bureau, and individual company's orders will be issued accordingly."

In the letter of July 25, 1917, wherein the plaintiff was notified by the Purchasing Bureau of Small Arms and Ammunition Manufacturers that an award of 22,500,000 cartridge clips had been made to it on its bid in response to circular proposal No. 63, it was stated:

"Contract for the quantity allotted to you will be made between the cartridge concerns represented by this bureau and yourselves. We will prepare, for your acceptance and signature, the contracts."

The plaintiff's letter of July 20, 1917, in response to circular proposal No. 63, issued by the Purchasing Bureau of Small Arms and Ammunition Manufacturers, and the bureau's letter of July 25, 1917, to the plaintiff, in which an award was made to it for the manufacture of 22,500,000 cartridge clips constitute the contract on which plaintiff's right to recover must stand or fall. The bureau in making the award to the plaintiff did not pretend that it was contracting for the Government, but on the contrary distinctly

and explicitly stated, both in circular proposal No. 63 and in its letter of July 25, 1917, that the contract to be entered into would be between the plaintiff and the cartridge concerns represented by the bureau.

To maintain its suit under the act of March 2, 1919, the plaintiff must establish the fact that its contract was with the Government and that the agent or agents with whom the contract was made were acting for and on behalf of the Secretary of War, or the President. *Baltimore & Ohio Railroad Company* v. *United States*, 261 U. S. 592, 596. This the plaintiff has failed to do. The contract upon which its suit is based was a contract with the Purchasing Bureau of Small Arms and Ammunition Manufacturers, and not with the Government.

If, however, the Purchasing Bureau of Small Arms and Ammunition Manufacturers had been an authorized agent of the defendant, and if the contract on which plaintiff relies had in fact been a contract with the Government, the plaintiff could not recover under the facts shown.

All clips furnished by the plaintiff were subject to inspection by proper officers or agents of the Ordnance Department of the United States Army. Only such clips as were approved by these officers or agents could be accepted. It was therefore incumbent upon the plaintiff to produce clips that would meet the test and pass inspection. It assumed all responsibility for the manufacture of clips in accordance with the plans and specifications. The defendant was not required (assuming that defendant was the contracting party) to inspect and approve in advance the materials used by the plaintiff in its manufacture of clips. It had been furnished with plans and specifications and was fully informed as to the kind of clips that would pass inspection and be accepted under the terms of the contract. The plaintiff was required to produce clips that, in their finished state, would meet the requirements of the specifications, and the proper officer or agent of the Ordnance Department was to be the sole judge as to whether such clips were acceptable under the contract.

Where a contract provides that a manufacturer shall furnish articles subject to the approval and acceptance of a

Government inspector, such inspector thereby becomes the final judge of their quality, and it is not within the province of the court to go back of such officer or agent and review his decisions, unless fraud, or mistake, or gross negligence such as would justify an inference of bad faith be alleged and proved. *United States* v. *Gleason*, 175 U. S. 588; *Yale & Towne Mfg. Co.* v. *United States*, 58 C. Cls. 633.

All clips produced by the plaintiff under its contract, which met the approval of the inspector for the Ordnance Department were accepted and paid for in full, consequently there was no breach of the contract.

The expense incurred by the plaintiff in the procurement of a proper metal out of which to produce finished clips satisfactory to the inspector, whose duty it was to pass upon them, was a part of the manufacturer's cost, and like other costs and expenses must be borne by the plaintiff company.

For the reasons stated the plaintiff can not recover and it is unnecessary to discuss or pass upon other points raised by counsel. The plaintiff's petition should be dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

ARTHUR BUSSEY v. THE UNITED STATES

[No. E-343. Decided June 2, 1930]

On the Proofs

Eminent domain; act of July 2, 1917; acquirement of personal property; suit on tort.—The act of July 2, 1917, 40 Stat. 241, authorized the acquisition by purchase or condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto for military use; pursuant thereto condemnation proceedings were instituted against plaintiff's property and defendant took possession thereof, but before termination of the condemnation proceedings the parties agreed upon a purchase price for the lands and a contract of sale was entered into, whereupon plaintiff deeded the premises to the Government: *Held*, that the act in question conferred no authority to acquire personal property, that the contract entered into necessarily re-

lated only to real estate, and to the extent that plaintiff's personal property was used, damaged, or destroyed by officers or employees of the Government such constituted a tort, for which no recovery can be had in the Court of Claims.

The Reporter's statement of the case:

McCutchen, Bowden & Gaggstatter for the plaintiff.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, a resident and citizen of Columbus, Georgia, was in October, 1918, the owner of a plantation in Chattahoochee County, Georgia, known as "Riverside," consisting of 1,782 acres, bordered on the west by the Chattahoochee River, a navigable stream, and on the north by Upatoie Creek. He operated on this property a farm, a dairy, a creamery, a ginnery, and a nursery. The property was well kept and well developed, and had on it all necessary tools and equipment. It was fully equipped with all the necessary dwellings for subordinates and tenant farmers and with stables, sheds, storehouses, and a valuable plant with all necessary machinery and equipment. He had installed for use in all of these activities waterworks, sewerage, irrigation, electric light, and telephone service. His equipment consisted of tractors, wagons, motors, and all necessary equipment, tools, and supplies for the operation of his undertakings. His stock consisted of 139 Guernsey, Holstein, and Jersey cattle, 98 hogs, 40 goats, and 28 horses and mules. He had under cultivation 318 acres of cotton, 60 acres of corn, 180 acres of velvet beans, 52 acres of cow peas, 1 acre of sweet potatoes, and 10,000 stalks of sugarcane.

II. In September, 1918, the Secretary of War, having determined to establish an infantry school of firing, and proceeding under authority of the act of July 2, 1917, 40 Stat. 241, directed the acquisition of approximately 115,000 acres of land in Chattahoochee County, Georgia, 1,782 acres of which consisted of plaintiff's plantation. Major John Paul Jones was named land acquisition officer and construction quartermaster, and the operations hereinafter referred to were performed subject to his authority and under his super-

vision. Colonel Henry E. Eames, the commandant of the infantry school, was given full authority to locate the lines of the reservation so as to secure the necessary ground for the school of fire then in process of formation. Plaintiff's plantation, in addition to its complete equipment of dwelling houses, waterworks, etc., constituted practically the only land in that section appropriate for the erection of an "A" range, an essential part of a layout of a school of fire.

III. October 16, 1918, the plaintiff, in response to the urgent requests of the authorized representatives of the defendant for the sale of his plantation, submitted a figure of $639,986.80 as the selling price. This included the value fixed by him of all personal property, as well as the real estate. This figure was not satisfactory to defendant and thereupon negotiations were begun and continued through several months by its representatives in an effort to effect an agreement with plaintiff for a definitive sales price. On November 1, 1918, prior to any agreement as to the purchase price and prior to the institution of any condemnation proceeding, the defendant, acting by and through Col. Henry E. Eames, commandant, and Maj. John Paul Jones, land acquisition officer and construction quartermaster, entered and took formal possession of plaintiff's plantation for and on behalf of the United States under authority of the act of July 2, 1917, and directed the plaintiff to vacate the same. At the time of the entry and the order to vacate on November 1, nothing was said about removing anything from the property to be acquired. The plaintiff was endeavoring to secure a sales price to cover his entire holding as a going concern. He protested the informal proceeding of taking possession of his plantation but was assured that he would be compensated for the property taken. On November 2, 1918, the United States, through the United States attorney for the northern district of Georgia, filed a proceeding in the United States district court for the condemnation of 115,-000 acres of land which included that of the plaintiff. One of the reasons for taking the plaintiff's plantation was the existence of a sufficient number of buildings adequate for housing a working force at the outset of construction, thus avoiding the delay to be experienced by erection of accom-

modations for the construction force. The contract for the construction of the cantonment, upon the cost-plus basis, was awarded to the Selden-Breck Construction Company on October 28, 1918. A small organization was brought upon the property in question and operations were begun November 2, 1918. The large dairy barn was converted into bunkhouses and a kitchen for the initial working force and was finished and in use by November 10; preparations were pushed forward for the ultimate accommodation of approximately 5,000 employees and a standard mess hall was erected for officers and civilian officials.

IV. On November 4, 1918, Colonel Henry E. Eames and Major John Paul Jones gave plaintiff verbal instructions to remove all personal property and effects, including the livestock, from the plantation by November 10, 1918. On November 6, 1918, Major John Paul Jones gave plaintiff the following written instructions:

"Confirming verbal instructions of the 4th instant given by Colonel Henry E. Eames and myself, it is requested that you have all property and personal effects, including livestock, removed from your premises by November 10, 1918, in order that possession of your land and buildings may be taken."

Inasmuch as the price to be paid for the property had not been determined, plaintiff protested. November 7, 1918, the United States attorney for the northern district of Georgia notified plaintiff that condemnation proceedings had been begun to acquire his property for the erection of a cantonment, that the military authorities were empowered by law to take immediate possession, that he should surrender the same upon demand, and that "your right to compensation is protected by the Constitution and the laws." The work of constructing the cantonment proceeded with all speed. Some personal property was removed by the plaintiff and negotiations were continued in an effort to arrive at a price to be paid by the defendant for the plaintiff's land and buildings.

V. Upon the taking of possession of the property by the defendant, plaintiff was notified that there was immediate need for the use of the cow barn and the mule barn, that the

cows must be removed and not allowed to return, and that the mule barn must be emptied of its contents. In compliance with these instructions, the plaintiff's cows were driven into the fields. The defendant's employees immediately entered, removed all of the stanchions, stalls, milking machines, and other equipment and supplies without regard to the damage caused, and set all upon the ground outside. The mule barn was filled with a large quantity of cotton seed, corn, and other products which the plaintiff proceeded to remove as expeditiously as possible during the interval between the first of November, 1918, and the first of January, 1919. He removed approximately 417 loads in his own wagons and with his own horses and mules, at which time the wagons were taken from him by the officials and agents of the defendant for use in construction operations on behalf of the defendant. Payment was subsequently made to plaintiff for these wagons as will hereinafter appear.

The same procedure was resorted to in connection with all of the other buildings on the premises; as and when a house was needed in connection with construction work, defendant's representatives would enter and cause its contents to be removed and subsequently utilize such portion as was desired for their own purposes in their operations or leave it in the open without much, if any, protection from the elements.

On November 13, 1918, John V. Vandemark, field representative of the real estate section, P. S. & T. division of the General Staff, wrote plaintiff as follows:

"The commandant of the Infantry School of Arms has asked that this office write you, urging you to impress upon those living on your premises near the camp construction work, that they make effort to move immediately.

"The real estate section of the War Department desires that any opportunity to assist in any possible way to reduce the difficulties to which you and those living on your premises are subjected, shall not be neglected. As representatives of the War Department explained to yourself and the Messrs. Dayhoff on November 4 buildings were needed by the 10th instant. The commandant feels that the notice received by you from the United States district attorney should be conveyed to your tenants and states that possession of the houses is necessary and is now desired.

"The real estate section feels that there will be appreciation on your part and on the part of Messrs. Dayhoff and other tenants, of the necessities under which the construction division acts, and that in the thought of your own inconvenience you will not lose sight of the requirements of the War Department, which make immediate action necessary."

On November 14, 1918, a general notice was published in the Columbus Inquirer-Sun, a newspaper published at Columbus, Georgia, that owners should remove all personal property from the premises taken by the United States and that the military authorities would endeavor to assist and cooperate with them so as to reduce their difficulties to a minimum and avoid damage, and that due diligence should be used to gather all crops and to remove them from the premises.

VI. December 23, 1919, plaintiff was given written notice to remove the personal property from some buildings located on the property east of Lumpkin Road. On January 22, 1920, Major General C. S. Farnsworth, commanding, wrote plaintiff as follows:

"All property, personal or real, of which you are the rightful owner, now on Government-owned land, must be removed from the Camp Benning reservation not later than February 7, 1920.

"The Government assumes no responsibility for the care or protection of said property and can not be held accountable for any loss sustained.

"The small size of the present garrison available to care for property on the reservation has compelled this notice."

On February 20, 1919, the following letter from the president, board of land damage claims, and signed by John Paul Jones, major, Quartermaster Corps, was sent to the plaintiff:

"The future policy of the Government as to the purchase of the lands in Muscogee and Chattahoochee Counties recently condemned for military purposes has not yet been announced, but the Government desires to be informed as to the extent of damage claims that would result should the policy be adopted of returning the land to its owners instead of completing its purchase.

"Under authority of The Adjutant General of the Army, a board is convened at Camp Benning to investigate all

damages claimed against the Government by owners of lands included within the area of the proposed Fort Benning project, caused by the Government's occupancy of their lands.

"If you wish to file claim for damages of any nature, caused by the Government's occupancy of your lands, you are requested to call at the Columbus office of the board, on 1st Avenue and 13th Street, as soon as possible, for an interview with a representative of the board. This will hasten action of the board with regard to your claims."

In response to the foregoing, plaintiff on May 24, 1919, submitted an outline of his claim with a detailed statement attached approximating damages at $324,000.

VII. Up to this time no agreement had been reached by the defendant and the plaintiff as to the price to be paid for the premises taken.

On June 18, 1919, the plaintiff executed a contract to sell his land to the defendant for $439,000, in which instrument plaintiff agreed "to release the United States of America, in case it shall purchase said land, from all claims of every kind and nature, by reason of dispossession and for damages to said lands or the improvements, crops of timber thereon situated." On the same day, plaintiff by deed conveyed title to "all those certain tracts and parcels of land * * * aggregating in one body 1,782 acres * * *," "together with all and singular the rights, members, and appurtenances thereof to the same being, belonging, or in any wise appertaining." The contract of sale and the deed of conveyance, being defendant's exhibit 7, are by reference made a part of this finding.

VIII. On October 2, 1919, a written notice was given to plaintiff to vacate the gin house and the store on or by October 2 and 10, 1919, respectively.

IX. Notwithstanding the various notices given plaintiff to remove his personal property and, except in the instances hereinbefore noted, he was hindered and prevented in the removal of his personal property upon the premises taken by the defendant. He was not free to enter or leave the premises except when he secured and was in possession of a pass; his employees were hired from him by the defendant's officers, employees, and agents at the time of

the taking of his wagons. On one occasion he was refused permission for his wagons, or others procured by him, to enter upon the premises for the purpose of removing his personal property. On another occasion plaintiff's foreman was arrested by the military guard and incarcerated overnight when he attempted to remove certain personal property of the plaintiff. At another time plaintiff prepared a list of articles he desired to move off the premises and sought the authorization of the quartermaster in charge but was informed that he would not be permitted to remove such property, and was told that instructions had been received that the articles in question could not be taken away. Plaintiff was also told by the same official that the removal of a certain large quantity of pipe would interfere with construction work then in progress; that the plaintiff would be permitted to remove only such material, equipment, and personal property as the defendant's employees "were not reserving at that time." Certain quantities of piping and other supplies belonging to the plaintiff were subsequently purchased from him by the Selden-Breck Construction Company and paid for by the United States, as will hereinafter be set forth. In an effort to remove a certain 150 bushels of wheat, the plaintiff's foreman, finding the building in which it was stored had been locked by order of the quartermaster in charge, was told in reply to his request for permission to remove it that he would not be allowed to do so or to move off "anything."

X. Some of plaintiff's machinery, the engines, boilers, and equipment, was taken over and used by the defendant's officials and employees, some was dismantled, and the remainder was left standing on the grounds unprotected. A considerable amount of the small equipment, such as buckets, lanterns, spades, pitchforks, plows, rakes, and hand tools, wherever found, was used without record or inventory notation and was, in due course, either worn out or thrown upon the junk heap. The machinery "was badly broken up in taking it out and also in loading and shipping it." The equipment and tools, after they had been used and had be-

come worn or useless, were relegated to the junk heap and later sold by the quartermaster to a junkman.

XI. On July 5, 1919, plaintiff was paid $432 for 96 days rental of nine wagons at $4.50 a day from March 1 to June 20. On the same date he was paid $275 as the purchase price for nine wagons, which amount was included in a total of $2,439 paid for various items of miscellaneous personal property consisting of supplies, tools, and piping.

XII. Plaintiff had on his plantation 139 head of cattle, all purebred Guernseys, Holsteins, and Jerseys, and of a value at the time the plantation was taken of $27,800.

Previous to the occurrences hereinafter noted this stock had always been in the best condition, were regularly milked and cared for, provided with shelter during the winter and rainy season and with adequate feed after the first frost in early November had destroyed their pasture.

When plaintiff was deprived of the use of his cow barn he had no place to keep the cattle and they were turned out into the fields, and were exposed to the cold and the rains for three successive weeks when they were sold by plaintiff. During this interim the stock did not receive adequate attention; the pasture was inadequate, there was no corral in which they could be confined, and the defendant's soldiers intimidated them in keeping them out of restricted areas. This treatment and the exposure to the weather and rains night and day for three weeks severely injured them; they became emaciated, their hair became rough, and some of the cows contracted a cough from which they did not recover; the milch cows fell off in giving milk, a loss that is never entirely regained, and the beef cows lost weight; as a result, the stock at the time of sale could not bring their former market value.

Plaintiff had not been ordered in the first instance to remove his stock; there was some suggestion by the defendant's officials that the cows, but not the bulls or calves, could be bought by the military authorities; the herd was therefore detained during the interval mentioned awaiting the prospective sale, but it was subsequently determined that no purchase could be authorized and the plaintiff, therefore, made

arrangement to dispose of them at the county fair. The herd was sold at auction to various individuals for a total of $8,461.

Plaintiff's 28 horses and mules were of a fair value of $5,000. They were later sold for $3,628.33.

The 40 goats on plaintiff's plantation were of a value of $400 and the 98 hogs had a value of $3,000.

Following the occupancy of the premises by defendant's officials, this stock was turned loose from its corral and when subsequently rounded up for sale the animals were in poor condition and it was found that some of the goats had been "barbecued" and the remainder were sold for $40; that 16 of the hogs were missing and the remainder were sold for $1,180.

XIII. The creamery was equipped and stocked with the machinery, articles, and supplies listed in Schedule 1 attached to the petition, which, for the purpose of description, is by reference made a part of this finding. The contents of the building were removed by defendant's employees; some part of the equipment, the exact amount not being shown, was used in connection with the cantonment and the remainder was placed outside of the building without protection; a large portion of the supplies was consumed or destroyed. The equipment and supplies subsequently secured by the plaintiff and removed are set forth in Schedule 1–A attached to the petition, which schedule, for the purpose of description, is by reference made a part of this finding. The value of these articles, supplies and equipment was $8,936.

XIV. The mill and ginnery were equipped with the machinery and articles listed in Schedule 2 attached to the petition, which, for the purpose of description, is by reference made a part of this finding. The contents were removed from the buildings by the defendant's employees; some portion was used in connection with the construction of the cantonment by the defendant's employees and agents, and the remainder, after exposure for ten months to the elements and unprotected from the rains, was, when it was removed and returned to the plaintiff, in a damaged and worthless

condition. The value of the equipment used, lost, or destroyed, less credit for the amounts received for that portion removed and sold by the plaintiff, was $5,000.

XV. The creamery was equipped with the machinery and articles listed in Schedule 5 attached to the petition which, for the purpose of description, is by reference made a part of this finding. This equipment and machinery were of a value of $5,000. All of the machinery and articles were removed from the building by the defendant's employees and were in part used in the construction work or stored outside the building and exposed to the elements, or otherwise destroyed or lost.

XVI. The store building was equipped with the articles listed in Schedule 7 attached to the petition, which, for the purpose of description, is by reference made a part of this finding, and were of a fair value of $2,000. The store was stocked with merchandise of an inventory value of $3,348.26. The storehouse had been locked when the defendant's employees took possession of the plantation. Subsequently, it was broken into by some one and its equipment, except a McCaskey register, the computing scale, and show cases of a total salvage value of $175, was either used by defendant's employees or agents or lost or destroyed. Merchandise of an inventory value of $1,826.99 was consumed in the mess by employees of the defendant or the Selden-Breck Construction Company.

XVII. The plaintiff had on the plantation the frame work and glass of four greenhouses, 18 x 100 ft., 6,000 feet of wrought and cast iron pipe, and all necessary valves, of the value of $1,000. This property was destroyed or otherwise used by the defendant's employees and agents in connection with construction of the cantonment.

On July 5, 1919, there was purchased 12,350 feet of piping and fittings and ten 2-inch brass gate valves from plaintiff for $500 which the United States paid.

XVIII. The contents of the plaintiff's residence are listed in Schedule 6 attached to the petition, which schedule, for the purpose of description, is by reference made a part of this finding. The household furniture, not desired for use

in that building, was taken by defendant's officers and employees for use of other of defendant's employees, or removed from the building; all of the contents of the residence were eventually returned to plaintiff in October, 1919, in a damaged condition. The damage to this property was $2,860.

XIX. The farm tools and equipment owned by plaintiff consisted of those articles listed in Schedule 4 attached to the petition, which, for the purpose of description, is by reference made a part of this finding. A considerable number of articles of the character listed in this schedule was purchased and paid for by the defendant for use in connection with the construction work, as set forth in Finding XI. There is no satisfactory proof as to what amount, if any, of these articles was used or destroyed by the defendant's employees in addition to those that were purchased by defendant's employees and agents.

The plaintiff's miscellaneous personal property not otherwise accounted for in the foregoing is listed in Schedule 8 attached to the petition, which, for the purpose of description, is by reference made a part of this finding. Some items of property of the character mentioned in this schedule were purchased by the defendant. There is no satisfactory proof of the specific items so purchased or of the items used or destroyed.

XX. The ungathered crops consisted of 318 acres of cotton constituting 27 bales, of a market value of $5,800; 60 acres of corn constituting 1,310 bushels, and of a market value of $1,900; 180 acres of velvet beans constituting 71 tons, and of a market value of $4,500; 52 acres of cow peas constituting 200 bushels, and of a market value of $350; 1 acre of sweet-potatoes constituting 150 bushels, and of a market value of $225; and 10,000 stalks of sugar-cane, of a market value of $200, making a total of $12,150. Permission had been granted to plaintiff to gather and remove his crops, but no period of time was specified and no effort was made by defendant's employees to safeguard the same. One of the first buildings erected on the cantonment was in the center of a cotton field and material for its erection was hauled into the same field, distributed and piled therein for the convenience of the workmen without regard to the damage to the

crop or without effort to minimize the resulting loss; other buildings were erected in the cornfields with like damage; with the assembling of several hundred draft animals, large numbers of mules and horses were turned loose into the fields to feed upon the growing crops. The plaintiff in an effort to salvage a portion secured and sold the undestroyed portion for $3,487.08.

The court decided that plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The act of July 2, 1917, 40 Stat. 241, authorized the Secretary of War to cause proceedings to be instituted in the name of the United States for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, and military training camps. The act further provided that when the owner of such land, interest, or rights pertaining thereto should fix a price for the same, which, in the opinion of the Secretary of War, should be reasonable, he might purchase or enter into a contract for the use of the land at such price without further delay. The act further provided "That when such property is acquired in time of war or the imminence thereof upon the filing of the petition for the condemnation of any land, temporary use thereof, or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes."

The Secretary of War caused condemnation proceedings to be instituted in the United States district court for the northern district of Georgia and took immediate possession of plaintiff's lands and buildings for military purposes. The plaintiff and the defendant finally agreed upon the purchase price of the lands by the United States and a contract of sale was entered into on June 18, 1919, on which date the plaintiff deeded the premises to the United States. The act in question conferred no authority to acquire personal prop-

erty and the contract between the plaintiff and the United States related entirely to the real estate.

Prior to the execution of the contract and the purchase of the real estate, plaintiff had been notified in writing to remove his personal property from the premises. No officer of the United States had any authority to take over the personal property of the plaintiff. It appears that plaintiff did not remove his personal property from the premises taken over by the United States before construction operations were commenced and that, subsequently, plaintiff was considerably hindered and interfered with by the agents and employees of the United States in his efforts to remove his personal property; that a considerable quantity thereof was injured or destroyed, or used by the employees and agents of the United States, and some portion of it was used by them in connection with the construction of the cantonment. To the extent that plaintiff's personal property was used, damaged, or destroyed, either by the Government's contractor or the unauthorized acts of officers or employees of the United States, such action constituted a tort, for which no recovery can be had in this court, and the plaintiff, if he can recover at all for the damage done, must look to Congress for relief. As was said by the court in *Bigby* v. *United States*, 188 U. S. 400, 404, "In such cases, where it is proper for the Nation to furnish a remedy, Congress has wisely reserved the matter for its own determination. It certainly has not conferred it on the Court of Claims." The court, quoting from *Langford* v. *United States*, 101 U. S. 341, 345, said:

"While Congress might be willing to subject the Government to the judicial enforcement of valid contracts, which could only be valid as against the United States when made by some officer of the Government acting under lawful authority, *with power vested in him to make such contracts*, or to do acts which implied them, the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of some one. For such acts, however high the position of the officer or agent of the Government who did or commanded them, Congress did not intend to subject the Government to the results of a suit in that court. This policy is founded in wisdom, and is clearly expressed in the act defining the jurisdiction of the court; and it would ill become us to fritter away the distinction between actions *ex*

delicto and actions *ex contractu*, which is well understood in our system of jurisprudence, and thereby subject the Government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives."

In *Robertson* v. *Sichel*, 127 U. S. 507, 515, the court said:

"The Government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests."

And, in *German Bank of Memphis* v. *United States*, 148 U. S. 573, 579, the court said:

"It is a well settled rule of law that the Government is not liable for the nonfeasance or misfeasances or negligence of its officers, and that the only remedy to the injured party in such cases is by appeal to Congress."

The court has steadily adhered to the general rule that, without its consent given in some act of Congress, the Government is not liable to be sued for tort, misconduct, malfeasances, or laches of its officers or employees.

See, also, *Hijo* v. *United States*, 194 U. S. 315; *Tempel* v. *United States*, 248 U. S. 121; *Ball Engineering Co.* v. *J. G. White & Co.*, 250 U. S. 46; *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330; *Bothwell et al.* v. *United States*, 254 U. S. 231; *Mitchell* v. *United States*, 58 C. Cls. 443; *Johnson* v. *United States*, 62 C. Cls. 234.

If the defendant could be held liable to pay for the unauthorized taking of plaintiff's personal property by Government employees or by the contractor, the facts are not sufficiently definite to enable us to determine what personal property was taken and its value, as distinguished from that which was damaged or destroyed.

The plaintiff is not entitled to recover. The petition must be dismissed, and it is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WYMAN, PARTRIDGE & CO. v. THE UNITED STATES[1]

[No. J-352. Decided June 2, 1930]

On the Proofs

Income and profits tax; statute of limitations; sec. 1106 (a), revenue act of 1926; extinguishment of liability; vested right to recover.—(1) Section 1106 (a) of the revenue act of 1926, providing that the "bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax," extinguishes liability for a tax collected after the period of limitations and after enactment of the revenue act of 1926 and while it was still in force. The liability having thus been extinguished a tax, upon its collection, was overpaid, and credit or refund was not within the exception of said section. (2) The right to recover such overpayment was vested and could not be taken away by repeal of said section 1106 (a) as of the date of its enactment by the revenue act of 1928, nor affected by section 611 of the revenue act of 1928. *Oak Worsted Mills* v. *United States*, 68 C. Cls. 539, *Gotham Can Co.* v. *United States*, 68 C. Cls. 749, and *Mascot Oil Co.* v. *United States*, *post*, p. 246, distinguished.

The Reporter's statement of the case:

Mr. Frank J. Albus for the plaintiff.

Mr. Charles R. Pollard, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant. *Mr. J. H. Pigg* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation, and on June 14, 1919, duly filed its corporation income and profits tax return for the fiscal year ended November 30, 1918, showing a tax liability of $363,641.97, which tax was paid during the same year. On February 12, 1924, the plaintiff and the Commissioner of Internal Revenue executed a waiver extending the statutory period for determination, assessment, and collection of taxes

[1] Certiorari applied for.

for the fiscal year ended November 30, 1918, "for one year from the date it is signed by the taxpayer." In May, 1924, the commissioner assessed against plaintiff an additional tax of $49,511.29 for the fiscal year ended November 30, 1918.

II. In order to avoid immediate payment of the additional tax assessed, and for the purpose of obtaining further consideration by the commissioner of the matter of its tax liability for the fiscal year in question, the plaintiff, on June 11, 1924, filed a claim in abatement of the said tax of $49,-511.29 on several grounds. On January 24, 1925, the plaintiff and the commissioner executed a second waiver further extending the statutory period for assessment of taxes for the fiscal year in question until December 31, 1925.

III. By a letter dated April 21, 1926, the commissioner advised plaintiff that its claim in abatement would be allowed to the extent of $3,518.42, and rejected in the amount of $45,992.87. The said letter also advised plaintiff of its right to file a petition with the United States Board of Tax Appeals for a redetermination of the proposed action by the commissioner, but the plaintiff elected not to file such a petition with that board.

IV. On August 17, 1926, the plaintiff, under protest, paid the unabated portion of the additional tax, $44,652.74 thereof being paid in cash, and the balance of $1,340.13 by the credit of an overpayment for a later year. Interest was also paid in the amount of $545.56 on August 17, 1926, and $5,236.97 on March 5, 1927.

V. On July 18, 1927, the plaintiff filed its claim for refund for the fiscal year ended November 30, 1918, in the amount of $45,197.74 "or such other amount as is legally refundable," on the ground that the same had been illegally collected after the statute of limitations had expired. This claim for refund was rejected by the commissioner on April 4, 1928.

The court decided that plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

Additional income and excess-profits taxes were assessed against the plaintiff for the fiscal year of 1918 and collected

Opinion of the Court

together with interest thereon after the period of limitations had expired. Plaintiff now brings this suit to recover the amounts so paid.

The plaintiff relies on section 1106 (a) of the revenue act of 1926, the provisions of which will hereinafter be set out. The defendant cites the cases of *Oak Worsted Mills* v. *United States*, 68 C. Cls. 539, and *Gotham Can Co.* v. *United States*, 68 C. Cls. 749, as authorities in its favor and claims that under the rules laid down therein it is entitled to judgment. Counsel for plaintiff insists that the decisions in these cases are erroneous. We do not agree with either of these contentions for the reasons that follow:

The instant case is similar to the two cases cited above in some respects. There was an additional tax assessed within the period of limitations as fixed by the second waiver, a plea in abatement filed by the taxpayer, proceedings were stayed until the plea in abatement could be considered, and upon consideration the tax was in part abated and in part confirmed after the statute of limitations had run. Thereafter demand was made for the payment of the unabated portion, which the plaintiff paid under protest with interest thereon, and shortly after filed a claim for refund of the amount so paid.

There is, however, an important difference in the facts in the instant case which renders it necessary for us to review the decisions in the *Oak Worsted Mills case*, *supra*, and the *Gotham Can case*, *supra*, and see whether or not they are in fact controlling. The payment of the tax in controversy was made August 17, 1926, after the passage of the 1926 revenue act and while it was still in force. This presents a different situation than that shown by the facts in the *Oak Worsted Mills case* and the *Gotham Can case*, for in both the tax was collected prior to the passage of the revenue act of 1926. In *Mascot Oil Co.* v. *United States*, No. K-67, decided February 17, 1930 [*post*, p. 246], a case in which the taxes were collected after the expiration of the period of limitations and after the passage of the 1926 act, we called attention to the fact that the *Gotham Can case* was not controlling, but did not pass on the effect of section 1106 (a) of the 1926 act by reason of other facts

in the case which we deemed did not make such a decision necessary. The opinion in the *Mascot Oil Co. case*, *supra*, has been withdrawn and a new opinion this day rendered upon the amended findings in order that a matter not discussed in the original opinion might be given attention, but the second opinion uses the same language with reference to the point above referred to and the judgment is the same as before.

In the *Oak Worsted Mills case* the question of the effect of section 1106 (a) of the act of 1926 was not presented in argument or discussed in the opinion. It is true that it was contended therein that the plaintiff had a vested right in the money which it sought to have refunded, but it was argued that this right accrued by reason of the limitation placed upon the time within which it could be collected, and we held that no vested right accrued to the taxpayer by reason of the running of the period of limitations for the collection of a valid tax. The chief contention made by counsel for plaintiff in the instant case is that plaintiff has obtained a vested right, but the claim now is that this right was obtained through section 1106 (a), to which reference has been made above.

In the *Gotham Can decision* we had occasion to discuss the application of section 1106 (a) to the facts in that particular case, which, however, as we have before noted, were different from those of the case at bar. In the opinion in the *Gotham Can case* we quoted from section 1106 (a) of the act of 1926 the following:

"The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; * * *"

It is contended now, as it was in the case last cited, that this provision created a vested right in plaintiff of which it could not be deprived without due process of law and without just compensation.

In the *Gotham Can case* we called attention to the fact that this provision was separated only by a semicolon from a qualifying clause reading as follows:

Opinion of the Court

"but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax."

This, we said, was a qualifying clause which must be construed together and in connection with the clause first quoted and we further stated—

"By the first clause it was intended to extinguish the liability and prevent collection of any tax barred by the statute of limitations, but under the second clause of the section it was made clear that if the tax had been collected after the limitation period but prior to the passage of the revenue act of 1926, only the amount collected in excess of the correct tax for the year could be recovered. If it is not so construed, the words of the second clause are obviously of no use whatever in any case."

And we further pointed out that it was our duty in construing the act to give these words some meaning if it could consistently be done. While some other language is used in the opinion, which standing by itself might be considered to have general application, it was intended that it should apply only to the particular facts in that case, and we think it is apparent that the chief point involved in the case at bar was not involved in the *Gotham Can case*. This will become more evident when we consider the difference which is made when we apply the statute to the facts in the instant case as distinguished from those in the two cases cited.

In the *Oak Worsted Mills case* and the *Gotham Can case*, the tax, being collected before the enactment of section 1106 (a) of the act of 1926, was still a liability of the taxpayer although the statute of limitations had run against the remedy provided for its collection. The payment of the tax having been made upon this liability and before it was extinguished, the taxpayer had not "overpaid the tax" and in such cases section 1106 (a) provided that "no credit or refund * * * shall be allowed." But in the instant case, by force of the same statute, the liability had been entirely extinguished when the payment was collected. Necessarily "the taxpayer has (had) overpaid the tax" for there was no tax owing at the time and no liability existed when the money was collected. The collector or commissioner, therefore, took money which was not owing to the

Opinion of the Court

United States and for that reason could not belong to it after it had been received. After it had been paid it was still the rightful property of the taxpayer. It is plain, therefore, that the question of whether a vested right had been acquired is quite different from what it was in the *Gotham Can case*, nor does it depend upon the statute of limitations as it did in the *Oak Worsted Mills case*. The statute, when applied to the facts in the instant case, did not merely put a limitation on the collection of the tax but it completely extinguished the liability, and this was done before the tax was collected. Under such circumstances we think the plaintiff obtained a vested right which could not be taken away by the subsequent repeal of section 1106 (a) as of the day upon which it was enacted.

Although the decisions in the *Oak Worsted Mills case* and the *Gotham Can case* are only applicable to cases where the taxes were collected after the expiration of the period of limitations but before the enactment of section 1106 (a) of the 1926 act, it has become necessary to review them at length. Unless our construction of section 1106 (a), as applied to cases where the taxes were paid after the enactment of this statute fits logically and harmoniously with the construction we have heretofore given it, obviously it can not stand.

Keeping this in mind, some further considerations supporting the rules laid down in the cases cited and in the case at bar can be added to support the statutory construction which has been given to section 1106 (a), and we find there is an important matter which seems hitherto to have been overlooked. While the existence of conditions precedent are necessary in order that section 1106 (a) may become applicable and these conditions are stated therein, section 1106 (a) is not by its terms retroactive and, in the very nature of the subject matter to which it is applicable, it can not be. Where prior to the passage of the 1926 act the payment had been made of a tax which was a liability although the remedy had been barred, the money so paid became the property of the United States; the transaction was closed; there remained neither debtor nor creditor. In such cases the liability for the tax was extinguished before the enactment of section

1106 (a) by the collection thereof. Manifestly, the provision of section 1106 (a) with reference to extinguishing the liability of the taxpayer did not and could not apply to cases in which no liability existed by reason of the whole matter being settled and closed. Section 1106 (a) therefore does not change the situation of the taxpayer as to taxes collected before its enactment. Congress, of course, might have given the taxpayer the right to recover any taxes which he had paid after the period of limitations had expired for the collection of the tax, for Congress can create a claim against the United States where none exists under the law as it stands; but in order to do this a very different provision from section 1106 (a) would have been required directly authorizing the person paying the tax, or from whom the tax had been collected, to sue the Government and recover back the amount paid. But this was not done, and we think it is quite manifest that Congress not only did not make the statute retroactive but had no intention of so doing.

It has been suggested that the construction which we have given to section 1106 (a) deprives this section of any force whatever, because the taxpayer could always recover any overpayment, providing, of course, that he duly filed a claim for refund. The statement that we have made above shows the error of such a conclusion, for we apply section 1106 (a) to cases that arose after it was enacted. In the *Gotham Can case* the tax was collected before the passage of section 1106 (a) and we applied the second clause of that section as preventing suits to recover taxes collected before its enactment. This situation distinguishes the *Gotham Can case* from the case at bar.

While some have criticized the language of this section as not being clear, we think its meaning and purpose are plain. It was intended as a statute of repose. It had no application to what had been done prior to its enactment, but it warned the public officials that after it was enacted the exaction of a payment upon a tax as to which the statute of limitations had run was taking money from the taxpayer without any liability on its part existing, or, in short, a collection made where there was no debt. This construction appears to us to be a reasonable one from every point of view. There

was no intention of making the statute retroactive and thus upsetting what had already been done, but it was intended that further collection of taxes after the period of limitations had run should stop. This would prevent further litigation and come nearer doing abstract justice than any other line of procedure that could have been provided.

Section 1106 (a) of the 1926 act was repealed as of the date of its enactment by the 1928 revenue act, but the rights of the plaintiff having become vested they were not affected by this repeal. See *William Danzer & Co.* v. *Gulf R. R.*, 268 U. S. 633, 637, and the contention of the plaintiff on this point must be sustained.

One other question remains to be decided. Section 607 of the revenue act of 1928 provided that a tax paid after the expiration of the period of limitations should be considered an overpayment, and section 611 of the same act qualified section 607 by providing that where a tax was assessed within the period of limitations, a plea in abatement filed and collection stayed, the payment of the tax before or within one year after the act went into force "shall not be considered as an overpayment under the provisions of section 607."

As before stated, we held in the *Oak Worsted Mills case* and the *Gotham Can case* that where the tax had been assessed within the period provided by the statute, a plea in abatement filed and the collection of the tax stayed, section 611 applied and there could be no recovery of the tax paid unless it was an actual overpayment. But these decisions applied only to cases where the tax had been collected prior to the enactment of the 1926 statute. In a case like the one at bar, where the rights of the plaintiff had vested before the enactment of the 1928 act, the enactment of section 611 of that act had no more effect on plaintiff's rights than the repeal of section 1106 (a) of the 1926 act.

In accordance with these conclusions judgment will be entered in favor of the plaintiff for the amount prayed in its petition, to wit, $45,197.74, with interest at the rate of six per cent per annum from August 17, 1926, until paid. It is so ordered.

WILLIAMS, *Judge;* and BOOTH, *Chief Justice*, concur.

LITTLETON, *Judge*, concurring: I concur in the result reached in the majority opinion, and I agree that section 1106 (a) of the revenue act of 1926 is not retroactive.

The officials of the Treasury Department collected the amount which plaintiff seeks to recover, as a tax imposed by the revenue act of 1918 for the fiscal year ended November 30, 1918, and as interest.

The defendant now insists that the retroactive repeal of section 1106 (a) of the revenue act of 1926 by section 612 of the revenue act of 1928 and the enactment of section 611 of the latter act revived the tax originally imposed by the 1918 act. It is not controverted that the amount collected, other than the interest, which was assessed in May, 1920, was then due as a tax imposed by the revenue act of 1918.

The plaintiff insists that section 611 of the revenue act of 1928 can not bar the recovery of the amount paid for the reason that this section is unconstitutional and void, in that it deprives it of a vested right which could not be taken away by subsequent legislation of Congress. The assessment in May, 1924, was a jeopardy assessment made without compliance with the provisions of law entitling the taxpayer to a hearing. This entitled plaintiff to file a claim for abatement, which was done, and no bond was required by the collector. The statutory period of limitation within which a tax for the fiscal year 1918 could be collected from plaintiff expired under the statute and the consents entered into between the plaintiff and the commissioner on December 31, 1925, at which time the tax had not been collected, and the Commissioner of Internal Revenue had made no decision of the claim for abatement. The commissioner rendered his decision on April 21, 1926. Collection was not made until August 17, 1926.

By the provisions of section 1106 (a) of the 1926 act, which became effective February 26, 1926, the plaintiff's liability for the tax was extinguished, and there was, therefore, no authority in law after December 31, 1925, for the collection of any amount from the plaintiff as a tax for the

fiscal year ended November 30, 1918. The evident purpose of the retroactive repeal of 1106 (a) of the 1926 act and the enactment of sections 607 and 611 of the 1928 act was to restore the system for the assessment and collection of taxes to what it was on February 26, 1926, when section 1106 (a) of the revenue act of 1926 extinguished the liability for any tax which was barred and had not been collected prior to that date and for a tax which should thereafter become barred, and provided for the refund only of the excess over the correct tax liability in respect of a tax which had been collected after the statutory period of limitation but before the passage of that act, with the added provision contained in section 611 (act of 1928) which was retroactive, authorizing the retention by the Government of a tax collected after the expiration of the statutory period of limitation for collection, if the amount so collected was assessed prior to June 2, 1924, and within the period of limitation provided by law, if the collection was stayed beyond the period of limitation by the filing of a claim in abatement.

I am of opinion, however, that none of the provisions of the revenue act of 1928 accomplished the result of reviving the liability in respect of a tax which became barred between February 26, 1926, and May 28, 1928, even if it be assumed that Congress had constitutional authority under its broad powers to lay and collect taxes, retroactively to recreate a liability for a tax which had been imposed by prior revenue acts and which tax became barred between these dates and the liability for which had been extinguished by section 1106 (a) of the 1926 act. Taxes are not imposed by implication and we may not hold that a liability for a tax once imposed, but extinguished, is revived or reimposed by a retroactive repeal of the statute which extinguished the liability. Prior to the enactment of section 12 of the Revised Statutes, now section 28, U. S. Code, Title 1, the repeal of an act which repealed a former act operated to revive such former act. *United States* v. *Philbrick*, 120 U. S. 54. And, while the provisions of section 1106 (a) extinguishing the liability for a tax barred by the statute of limitation was not an act expressly repealing the revenue act of 1918, in effect a tax imposed by the act of 1918 and barred by the

Concurring Opinion by Judge Littleton

statute of limitation was abrogated and annulled by the new and substantive provision of this section as completely as if express words repealing the imposition of such tax had been used, and no language can be found in any of the provisions of the revenue act of 1928 reimposing the tax or recreating the liability therefor which had been extinguished by section 1106 (a) of the 1926 act. Section 612 of the revenue act of 1928 retroactively repealing section 1106 (a) of the 1926 act can not be construed as reviving the liability for the tax imposed by the revenue act of 1918. Nor can section 611 of the 1928 act be of any help to the defendant in this regard for it only authorizes the Government to retain the amount of *any tax* assessed and paid after the statute of limitation, or assessed before and paid after the limitation period. At the time the amount here in question was collected from the plaintiff there was no *tax* in existence which could have been stayed by the abatement claim. It seems to me, therefore, that the provisions of section 611 can only be applied to those cases where the tax was collected after the expiration of the statute of limitation but prior to the enactment of the revenue act of 1926, and the collection of tax as to which the statute of limitation expired before collection on a date subsequent to the enactment of the revenue act of 1928. So far as concerns the taxpayer's right to recover the amount of a tax collected after the expiration of the statute of limitation, the first clause of section 1106 (a) of the 1926 act extinguishing the liability gave the taxpayer no greater right than what he had before because, if he were compelled to pay a tax that was barred by limitation, he could recover it. *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346. But, as substantive law, the provisions of section 1106 (a) extinguishing the liability had a different and greater effect upon the right of the Government to retain an amount collected while there was no liability for it as a result of the repeal of the statute which extinguished the liability of the taxpayer. *Dobbins* v. *Commissioner of Internal Revenue*, 31 Fed. (2d) 935; *Erie Coal & Coke Co.* v. *Heiner*, 33 Fed. (2d) 135; *A. T. Wettengel* v. *Robinson, et al., Trustees*, decided by the Supreme Court of

Pennsylvania May 12, 1930, Para. 1084, P. H. Fed. Tax Service, 1930, Vol. 1.

I am of opinion, therefore, that plaintiff is entitled to recover because its liability for any amount was extinguished before the amount in question was collected, and such liability has not been revived.

I do not deem it necessary to pass upon the constitutionality of the provisions of the 1928 act. I am not prepared to agree that the extinguishment of a liability for a tax, which is a debt due the sovereign, creates such a vested or property right as was beyond the control of Congress. The obligation to pay taxes rests not upon the privileges enjoyed or the protection given to a citizen but upon necessity of money for the support of the Government, but the citizen receives compensation therefor in privileges and protection. A tax is a demand of sovereignty. In *Loan Association* v. *Topeka*, 20 Wall. 663, the court said:

"Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is, in its very nature, unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of Government, the prosecution of war, the national defense, any limitation is unsafe. The entire resources of the people should, in some instances, be at the disposal of the Government. The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people."

There are many considerations which would enter into the question of the authority of Congress to recreate a liability to the Government for a tax that has been extinguished. A tax that is due is a debt due the sovereign and the ordinary statute of limitation relates only to the remedy and the repeal of the limitation provision, even after the debt has become barred, does not deprive the citizen of his property without due process of law in violation of the fifth amendment. *Campbell* v. *Holt*, 115 U. S. 620; *Wm. Danzer & Co., Inc.* v. *Gulf & Ship Island R. R. Co.*, 268 U. S. 633. Is the situation any different where a citizen is indebted to

the Government for a valid tax, the liability for payment of which he is relieved, and shortly thereafter Congress decides to recreate the liability and remove the bar of the statute? The sovereign is not bound by the statute of limitation except by its consent, and in respect of taxes it would seem that, although the tax had become barred, Congress could have repealed the statute of limitation and thereby revived the right of the Government to collect. *Campbell* v. *Holt*, *supra*. May not Congress also, even though the liability for a tax as to which the statute has run has been extinguished, repeal the limitation statute and the statute extinguishing the liability for the tax and by appropriate legislation recreate the liability? It would seem that the only objection that could be raised to such action would be the power of Congress retroactively to recreate a liability for a tax that, beyond question, had once been lawfully imposed. Cf. *The City of Seattle* v. *Kelleher*, 195 U. S. 351; *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Billings* v. *United States*, 232 U. S. 261; *Rafferty* v. *Smith, Bell & Co., Ltd.*, 257 U. S. 226. If Congress has authority retroactively to impose a tax and thereby create a debt for the tax to the sovereign in the first instance, has it not equal authority to reimpose and revive a tax that has been abrogated by a statute of limitation that relieved the taxpayer from liability? The case of *Wm. Danzer & Co., Inc.* v. *Gulf & Ship Island R. R. Co.*, *supra*, was a suit for damages between private persons and the court held that to construe section 206 (f) of the transportation act, suspending the statute of limitations during Federal control of railroads, retroactively, so as to create a liability that was barred at the time of its enactment, would be to deprive the railroad company of its property without due process of law in violation of the fifth amendment. That case is not necessarily authority for the proposition that the same rule would apply to the sovereign power of taxation.

Reporter's Statement of the Case

JOHN FIRTH v. THE UNITED STATES

[No. 34141. Decided June 2, 1930]

On the Proofs

Patents; infringement; Midgley patent on wave meter; validity.—Letters Patent No. 1018769, issued to plaintiff as assignee of Midgley, on improvement in wave meters for measuring the wave length or frequency of oscillations such as are utilized in wireless telegraphy and telephony, which employs a unipolar connection, i. e., one wire or metallic connection from one terminal of the detector to the oscillating circuit, the other being left free, the object of such form of connection being to draw a minimum part of the energy from the oscillating circuit and thus leave the same capable of sharpest and most accurate resonance or tuning, *held* valid as to claims 4 and 5 thereof. Infringement conceded.

Same; novelty; use of similar scientific basis; anticipatory inventions reconstructed in light of challenged patent.—Where in a suit for infringement of patent the issue of novelty is not made dependent upon the result of the invention, but upon the obtaining of the same results in preexisting devices upon a similar scientific basis, patents already in the art must be in part reconstructed from knowledge imparted by the challenged patent in order to settle the question of anticipation.

Same; obviousness; Patent Office examiner; mechanic skilled in art.—Where the validity of a patent is in issue, the inability of the Patent Office examiner unaided to satisfy himself that the device in question would work is evidence that its operativeness would not be obvious to a mechanic skilled in the particular art.

The Reporter's statement of the case:

Mr. M. Theodore Simmons for the plaintiff.

Mr. Melville D. Church, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff, originally a subject of the King of Great Britain, on November 29, 1922, declared his intention to become a citizen of the United States, and on October 3, 1925, completed the requirements for citizenship in the United States and is now a citizen of the United States.

II. On February 25, 1911, Frederick W. Midgley filed application, serial No. 610757, for United States letters patent for improvements in wave meters.

A certified copy of the file wrapper and contents of said application, plaintiff's Exhibit 12, is by reference made a part of this finding.

The record of the proceedings in the Patent Office on said application is shown in the certified copy of the file wrapper and contents thereof, plaintiff's Exhibit 12.

III. On or about March 25, 1911, the said Frederick W. Midgley assigned to plaintiff the entire right, title, and interest in and to the aforesaid application for letters patent, and to any and all patents issuing thereon.

IV. On February 27, 1912, Letters Patent #1018769 were duly issued to plaintiff as assignee on the aforesaid Midgley application, serial No. 610757, and plaintiff has continuously since said assignment been the sole owner of said invention and patent thereon and has not sold, transferred, or assigned this claim or any part thereof to anyone.

V. The patent in suit deals with an improvement in wave meters for measuring the wave length or frequency of oscillations such as are utilized in wireless telegraphy and telephony.

A wave meter comprises in its essential details two elements.

The first of these is a simple calibrated radio or oscillating circuit consisting of inductance and capacity in series, either or both of which may be varied to adjust or alter the natural frequency of the circuit.

When such circuit is used to measure the wave length or frequency of oscillations given out by a source it is placed in a position to receive radiant energy therefrom, which will induce or cause a current to flow in the circuit.

By altering the inductance or capacity of the oscillating circuit, its natural frequency may be altered, and the circuit thus brought into "tune" or resonance with the source of oscillations. When this point is reached, the induced current in the circuit becomes a maximum.

The second essential element is a detector or current-indicating device connected with the oscillating circuit to indi-

cate the current flow therein, so that the point of resonance may be established.

VI. The patent in suit utilizes for the aforesaid current-indicating device the usual type of crystal detector known as a self-restoring detector having a conventional telephone connected to its terminals for the purpose of rendering audible the flow of electrical energy in the oscillating circuit.

The invention in issue, as expressed in claims 4 and 5 of the patent in suit, deals with the form of connection between the oscillating circuit and the detector.

This connection utilizes one wire or metallic connection from one terminal of the detector to the oscillating circuit, the other being left free, such form of connection being defined as a "unipolar" connection.

The object of such form of connection is to draw a minimum part of the energy from oscillating circuit for energizing the detector, and thus leave the osocillating circuit capable of sharpest and most accurate resonance or tuning.

Claims 4 and 5 define the invention, as follows:

"4. A wave meter comprising a condenser and inductance forming an oscillating circuit, and a self-restoring detector having unipolar connection with said oscillating circuit.

"5. A wave meter comprising a condenser and inductance forming an oscillating circuit, a self-restoring detector having unipolar connection with said oscillating circuit, and a signal translating instrument having its terminals connected to the terminals of said detector device."

There is no evidence to carry the date of the invention defined in the above claims back of the filing date of the patent in suit.

VII. In the first action by the Patent Office on the Midgley application, which matured into the patent in suit, the examiner in his letter of April 10, 1911, requested further explanation as to the operation of applicant's device, and queried the operation of the detector as follows:

"* * * it is not seen that the detector W would be operated by oscillations in the wave meter. W being connected near one terimnal of condenser K, that is, at a current node, it is not seen how there would be any current flowing through the detector and telephone."

Reporter's Statement of the Case

Applicant responded to the query by suggesting a theory of operation based on electrostatic capacity of the detector and offered to file an affidavit of operativeness.

VIII. Subsequent to the issuance of the patent in suit and within six years from the filing of the petition in this case, wave meters were manufactured by or for the United States, without the license or consent of plaintiff, which wave meters embodied a condenser and inductance forming an oscillating circuit, a self-restoring detector of the crystal type with its terminals connected to a signal translating instrument or telephone, and a unipolar or single wire connection from the oscillating circuit to the detector.

This structure is disclosed in an instruction book entitled "U. S. Navy Wavemeter, type CE 614A," a copy of which is plaintiff's Exhibit 2 and which is by reference made a part of this finding.

The virtues of the unipolar connection as defined by the claims in suit were referred to in Bureau of Standards Circular No. 74, issued March 23, 1918, plaintiff's Exhibit 10, which is by reference made a part of this finding.

IX. The following patents and publications were available to the public prior to the filing date of the patent in suit:

"Electric waves," by Hertz, translated by Jones, published by Macmillan & Co. page 31, Fig. 6: defendant's Exhibit F.

U. S. Patent to Stone, #714831, issued December 2, 1902: defendant's Exhibit A.

U. S. Patent to Shoemaker, #932819, issued August 31, 1909: defendant's Exhibit D.

British Patent to Shoemaker, #8890B of 1905: defendant's Exhibit G.

U. S. Patent to Donitz, #763164, issued June 21, 1904: defendant's Exhibit C.

The above exhibits are by reference made a part of this finding.

X. The citation from "Electric Waves," by Hertz, discloses an induction coil with its secondary terminals connected to a spark gap for the purpose of producing radiant energy. One side of the spark gap is connected by means of a single wire with an oscillating circuit comprised of a single rectangular loop of wire. A small or micrometer spark gap is inserted in series in this loop to function as a detector

or indicator of energy induced in the loop by the discharge of the induction coil across the main spark gap.

XI. The Stone patent, #714831, relates to receiving circuits for radio signals or waves. The patent relates more particularly to tuning or selective signaling.

Fig. 6 discloses a closed oscillating circuit connected to an antenna. The oscillating circuit comprises an inductance, a coupling coil, and two condensers, all in series. A coherer which acts as a detector is shown with its terminals connected across one of the condensers. The purpose of this connection is stated on page 5, line 20—

"* * * there will be a maximum potential difference developed at the plates of the condenser C, and this potential will operate the coherer K."

XII. Patent to Shoemaker, #932819, discloses a wave meter with an oscillating circuit comprised of an inductance and capacity in series. The detector or wave-responsive device which is used in conjunction with a telephone has one of its terminals connected to one side of the inductance. The other terminal of the detector is connected to the other side of the inductance through a series condenser or capacity.

XIII. The British patent to Shoemaker, #8890B of 1905, discloses a loop antenna connected to ground on both legs through an inductance. Fig. 3 shows a second inductance connected to one of the leg inductances through the medium of a slider or adjustable contact. This connection is by means of a unipolar connection or single wire, the other end of the inductance being left free.

This second inductance is bridged by a circuit having a detector and capacity in series. One end of this circuit is also variable with respect to the inductance by means of a slider shown in the drawing as d.

The detector also has its terminals connected to a telephone.

XIV. The patent to Donitz, #763164, discloses a wave meter having an oscillating circuit comprised of a variable capacity in series with an inductance.

The inductance is interchangeable with other inductances of various values.

A hot wire ammeter is inductively coupled into the main oscillating circuit.

XV. It is stipulated between the parties that the portion of this case dealing with the amount of compensation be reserved until this court shall have determined the questions of validity and infringement of the patent in suit.

The court decided that plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The petition in this case discloses a suit to recover under the act of June 25, 1910 (36 Stat. 851), as amended by the act of July 1, 1918 (40 Stat. 705), for the infringement by the Government of a patented device. The plaintiff acquired title to the patent from the inventor, Frederick W. Midgley, who assigned the same to plaintiff while his application was still pending in the Patent Office. The patent, #1018769, was granted plaintiff on February 25, 1911. The issue now before the court is the validity of the patent if valid infringement is conceded. We say this because the Government's brief discusses no issue other than validity of the patent.

The invention involved is a wave meter, and plaintiff relies upon claims 4 and 5 to sustain his case. We quote the claims from the patent as follows:

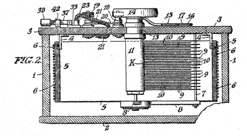
"4. A wave meter comprising a condenser and inductance forming an oscillating circuit, and a self-restoring detector having unipolar connection with said oscillating circuit.

"5. A wave meter comprising a condenser and inductance forming an oscillating circuit, a self-restoring detector having unipolar connection with said oscillating circuit, and a signal translating instrument having its terminals connected to the terminals of said detector device."

Wave meters as such are not new. As its name implies, it is an electrical device for measuring the frequency of oscillations, such as are employed in wireless telegraphy or telephony. The primary objects of attainment in such a device are accuracy, availability, and simplicity. The inventor in this case was seeking to improve existing devices by constructing a compact meter, comparatively small and light, considering its range, which would obviate interchangeable

or removable inductance windings or coils used therein. To accomplish the purpose the inventor employed the adopted elements of the art except in one particular, and it is the ingenious and novel way in which he overcame the difficulties of existing arrangements that brought forth a wave meter acknowledged to be an improvement over those that had gone before.

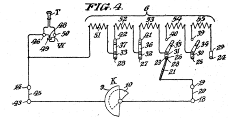
Stated as plainly as possible, a wave meter is designed to accomplish the measurement of waves broadcasted into the air as in radio, wireless telegraphy or telephony. To accomplish this an electrical device composed of a calibrated circuit possessing both inductance and capacity is essential, either or both of which may be varied. This instrument, when placed with reference to a transmitting or generating oscillating circuit in which a high frequency current is flowing, absorbs a portion of the radiant energy coming therefrom, and a current will be set up and induced into the calibrated circuit. The patentee accomplished the above by means of the inductance coils and adjustable condenser in circuit as disclosed by the following figure taken from his letters patent:



The novelty which the inventor conceived with reference to Fig. 2 resides in the way in which he translated the means of ascertaining the presence and value of the current flow within the wave meter itself, i. e., by employing a detector or wave-responsive device—a common one used is illustrated in a receiving radio set where a crystal serves

Opinion of the Court

this purpose—which was not included either in shunt or series with the oscillating circuit illustrated in Fig. 2, i. e., only one terminal of the crystal or other suitable detector "is in electrical communication with the oscillating circuit, the other terminal of the detector being free or unconnected, so far as the oscillating circuit is concerned, and that the telephone or other instrument T is connected to the terminals of the detector W." Fig. 4 taken from the patent illustrates a diagrammatic view of the device.



This is what is known as a unipolar connection and is no more nor less than a means of translating the knowledge of the presence and value of the current flow in the calibrated receiving set, and its predominating novelty resides in the ability to receive such translation from a device wherein the detector is connected with the oscillating circuit in unipolar fashion. "W" represents the detector, and the unipolar connection is the single wire leading from the oscillating circuit to 46. The utility of this novel connection and its distinct value in the art are found in the fact that a unipolar connection of the detector with the oscillating circuit maintains the persistency of the oscillating circuit by deriving therefrom a minimum of energy and thus permitting the oscillating circuit to respond to a sharper and more accurate resonance or tuning, attaining the final result of more accurate measurements of wave lengths and frequency. To function with a maximum of proficiency it is a recognized necessity to so connect the detector with the oscillating circuit as to abstract from the

oscillating circuit a minimum of energy and thus secure the desired objective of sharper and more pronounced resonance or maximum energy. This feature of the device in suit is without question obtained in the patentee's unipolar connections.

The issue raised as to novelty is not made dependent upon the result, but upon the obtaining of precisely similar results in preexisting devices upon a similar scientific basis. The defendant challenges the validity of the patent, not alone upon prior art, but upon an alleged demonstrable scientific principle that unipolar connections in fact are nonexistent in the plaintiff's device, and if relied upon are scientifically inoperative. The conceptions of prior inventors in the art without exception disclose a failure to employ a unipolar connection with reference to the oscillating circuit, i. e., the energy from the oscillating circuit was translated by the detector either in series or shunt connection. The defendant, as we apprehend the contention, insists that a completed circuit is a scientific necessity if the device is to operate, and that the construction relied upon in this case acquires a completed circuit including the detector with the oscillating circuit because the elements of the detector possess a capacity relationship with the adjacent portions of the wave-meter structure, and through such capacity relationship a return circuit is formed with the unattached terminal of the detector. In other words, the unipolar connection with the oscillating circuit is not from a scientific viewpoint unipolar, but multiple because the relationship between the detector and the oscillating circuit enables electric energy to span the space left open by the unipolar connection, thereby completing, without physical structure, the scientifically required circuit. The necessity for establishing a capacity return from the free terminal of the detector back to the oscillating circuit of the wave meter resides in the prior art exhibits, for, as to be hereafter discussed, prior inventors had not conceived the possibility of a functioning device predicated upon unipolar connection.

Whatever of merit attaches to the above defense, it is to be noted that to sustain it recourse must be had to existing

patents and they in part reconstructed from knowledge imparted by the challenged patent in order to ascertain similarity and anticipation. The following cases cited by the plaintiff are apropos: *Sewall* v. *Jones*, 91 U. S. 171; *Bates* v. *Coe*, 98 U. S. 31. As repeatedly observed in numerous decisions of the courts in patent cases, "after a thing has been accomplished it is not difficult to ascribe reasons for a failure to anticipate it."

Much reliance is placed upon the prior patents to Shoemaker. The condenser C, shown in Fig. 4 of the Shoemaker patent, is a concrete and tangible piece of electrical apparatus. It is referred to on page 2 of the patent as follows:

"With the intervening condenser C of suitable capacity the region of maximum response is very sharply defined * * *."

The test here is one of interpretation. Would the man skilled in the art, upon reading the Shoemaker disclosure, be led to omit the condenser C, together with its respective connections to the detector and to the inductance, and thereby obtain the beneficial results flowing through such omission and which have been adequately proved? We think not. We are assisted in arriving at this decision from the history of the proceedings in the Patent Office. As set forth in Finding VII, the examiner of the Patent Office queried the operation of the detector by means of a unipolar connection, and stated that "it is not seen how there would be any current flowing through the detector and telephone." If the operativeness of the unipolar connection was not apparent to the Patent Office examiner, whose routine daily duty involved the constant study of intricate electrical inventions, it seems clear that the omission of the condenser C of the Shoemaker patent, together with its connecting wires between the inductance and the detector, would not be obvious to the mechanic skilled in this particular art. We therefore do not believe that the Shoemaker patent either directly or indirectly teaches the use of the invention at issue.

The British patent to Shoemaker discloses in Fig. 3 a radio receiving circuit comprising a loop antenna grounded at both of its ends through variable inductance coils. There is a second inductance connected to one of these leg induc-

tances by means of a single wire or unipolar connection. This second inductance is bridged by a circuit having a detector and capacity in series, the detector actuating a telephone to render audible oscillating currents set up in the receiving antenna and impressed upon the inductance, which is connected thereto by the unipolar connection. The detector circuit is substantially similar to that shown in the patent to Shoemaker, #932819, which has been discussed, *supra*, in that one terminal of the detector is connected to one end of the inductance and the other terminal of the detector is connected to a variable point of the inductance through a series condenser or capacity.

While the unipolar connection exists between the antenna and the slider inductance, we find the detector circuit a complete one involving a tangible and concrete condenser element, and what has been said with reference to the Shoemaker patent #932819, relative to the omission of the condenser and its connections, applies with equal force and effect.

The citation from "Electric Waves," by Hertz, discloses an induction coil with its secondary terminals connected to a spark gap which, when operated, will produce radiant energy or electric waves. One side of this spark gap is connected by means of a single wire or unipolar connection to an oscillating circuit comprised of a single rectangular loop of wire. In order to detect electrical oscillations in this oscillating circuit a minute spark gap is left, which functions as a visual detector. This spark gap, if it can be properly termed a "detector," is in series with the oscillating circuit and no unipolar connection of a detector is accordingly suggested.

The reason for the citation of the patent to Donitz, #763164, is not apparent, unless it is for the purpose of showing that wave meters, *per se*, employing an oscillating circuit having inductance and capacity were old and well-known devices. This patent discloses a type of hot wire ammeter or thermal indicator for visually indicating the current flow in the oscillating circuit and in no way suggests or discloses any unipolar connection between the oscillating circuit and the detector.

Opinion of the Court

The Stone patent, #714831, relates to a receiving circuit for radio signals and discloses a closed oscillating circuit which possesses capacity and inductance in series. The device for detecting the current flow in this oscillating circuit comprises what is known as a coherer and this is connected across one of the condensers in the oscillating circuit; that is to say, one of the terminals of the coherer is directly connected to one side of the condenser and the other terminal of the coherer is directly connected to the other side of the condenser. The purpose of such connection is stated to be to impress a maximum potential difference upon the coherer or detecting device. This is the direct antithesis of the structure called for by the claims in suit, in which but one terminal of the detector is connected through a unipolar connection for the purpose of supplying to the detector a *minimum* amount of energy rather than a *maximum*. There is, therefore, no disclosure in this patent in any way indicating the unipolar or single connection and the consequent advantages flowing therefrom.

We are unable to find anticipation; there is nothing in the prior art which approaches plaintiff's construction, and, in our view of the record, plaintiff did succeed in bringing into being a decidedly new and novel improvement in the way of constructing wave meters. The Government has recognized the utility of the principles embodied in the patent in suit. The Bureau of Standards, Department of Commerce, in Bulletin #74 dated March 23, 1918, entitled "Radio Instruments and Measurements," at page 105, states:

> "When the source [of oscillations to be measured] supplies only a small amount of power, it is necessary to use a sensitive indicator, such as a crystal detector and phones. [Midgley shows these in his patent.] When such a detecting circuit is connected or coupled to the wave-meter circuit, the wave-length calibration and the resistance of the wave-meter will be changed somewhat, depending upon the type of detecting circuit. The changes will also depend to some extent upon the adjustment of the crystal contact, so that it is important in the design of a wave meter *to choose a detecting circuit which will least affect the wave-meter constants.*" (Brackets and italics ours.)

The patentee, it seems to us, undoubtedly did conceive the prime necessity "of a detecting circuit which will least affect the wave-meter constants," and by a unique and novel construction create a device which admittedly accomplishes the desired end. In this respect, his contribution to the art is entitled to distinct recognition, and, in our judgment, his claims are valid. Infringement is conceded. The case, as per agreement, will be remanded to the general docket with leave granted to take proof as to damages. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

MOUNT MANRESA v. THE UNITED STATES

[No. H-118. Decided June 2, 1930]

On the Proofs

Leases; implied covenant against voluntary waste.—There is an implied covenant in every lease that the tenant will surrender the premises at the end of the term in as good condition as they were at the commencement of the lease, reasonable wear and tear and damages by the elements excepted, and it is not necessary that there be incorporated therein an express stipulation to that effect to make the tenant liable for voluntary waste or want of reasonable care in the use of the premises.

The Reporter's statement of the case:

Mr. Walter H. Griffin and *Putney, Twombly & Putney* for the plaintiff.

Mr. Edwin S. McCrary, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is and was at all times hereinafter mentioned a corporation organized and existing under the laws of the State of New York. It was organized in 1911 under Article III of the membership corporations law of that State with the object of establishing spiritual retreats for laymen. It was entirely maintained by voluntary contributions.

II. At all times hereinafter mentioned plaintiff was and still is the owner in fee of approximately twenty-two acres of land situated on Fingerboard Road, in the Borough of Richmond, in the city and State of New York.

III. On or about the 13th day of December, 1917, the plaintiff duly entered into a written lease with J. L. Knowlton, colonel, Quartermasters Corps, United States Army, for and in behalf of the United States, whereby the plaintiff leased to the United States approximately four acres of its property referred to in Finding II hereof, at a monthly rental of six and 666/1000 dollars ($6.666).

The lease was made for a term beginning with January 21, 1918, and ending with June 30, 1918, with a provision contained in paragraph 9 of the lease that, at the option of the lessee, the lease might be renewed yearly as often as the needs of the public service might require, so as to give the lessee continuous possession of the premises, not extending, however, beyond June 30, 1922.

The lease stated that the property described therein was—
"to be used by the United States to construct a clearing hospital thereon," and in paragraph 3 it was provided that—

"all buildings and other improvements fixed to or erected or placed in or upon the said premises by the lessee shall be and remain the exclusive property of the lessee, provided that the same, unless sold or otherwise disposed of, shall be removed by the lessee within thirty (30) days after the said premises are vacated under this lease."

IV. The United States entered into the possession and occupation of the leased premises on or about the 21st day of January, 1918, and thereafter continued in the use and occupation of the property up to and including the 26th day of May, 1922.

V. Prior to the plaintiff's acquisition of the twenty-two-acre tract hereinbefore referred to it had been occupied as a residential estate. The property fronted on Fingerboard Road, where the buildings which housed the residential quarters were located, and sloped gradually upward to the northeast. The grounds were generally rolling as to contour, and, with the exception of the four acres at the ex-

treme northeast corner which had been leased to the United States, had been extensively landscaped by the former owner with trees, shrubbery, gardens, and driveways. The four acres had been left largely in their natural state. Approximately one acre of the four was under cultivation as a garden. The remaining three acres were wooded with oak, chestnut, walnut, and other forest trees. A fringe of trees surrounded the four-acre tract. A five-foot wire fence built in 1915 surrounded three sides of the premises leased.

VI. During the period of its occupation the United States erected on the leased premises three hospital buildings, each of them being approximately one hundred and fifty feet long, thirty-five feet wide, and one story in height. The buildings were of frame construction supported on concrete piers. Excavations were made on the property for the concrete foundation posts which supported the buildings, and excavations were also made under and between the buildings for drainage ditches and for the construction of trenches and concrete conduits to carry electric wires, gas, water, and steam pipes, water mains, sewer pipes, and such other utility pipes as were necessary for the construction and maintenance of a hospital. Cinder waterbound macadam roads were built on the easterly and westerly sides of the property for heavy trucking, and paths and walks were constructed to connect the several buildings. The construction of one of the roadways necessitated a side-hill excavation with a concrete retaining wall approximately two hundred feet long, nine feet high, and one and one-half feet thick.

VII. On or about May 26, 1922, the United States Veterans' Bureau sold the buildings, structures, improvements, fixtures, utilities, and other similar property located on the leased premises at public auction. Paragraph 7 of the terms of sale under which the property was sold at auction is as follows:

"7. All buildings, structures, improvements, fixtures, utilities, and other similar property sold, unless purchased by the owners of the land upon which located, shall be removed from the premises by the purchasers thereof before July 30th, 1922. Purchasers shall wreck, dismantle, and remove the property purchased and shall conduct their sal-

vage operations in a careful and workmanlike manner with due and proper regard to the property and operations of other purchasers and in such manner as not to interfere with the operations of such other purchasers or with the control and occupation by the Government of any buildings, structures, improvements, or other property not included in this sale. Purchasers shall also be required to thoroughly clean and clear up the ground area covered by their purchase and, with the exception of concrete and masonry, shall remove all foundations, piers, posts, and floors and shall fill in and level off the excavations resulting from such removals. All débris and rubbish resulting from such operations shall be disposed of to the satisfaction of the representative of the U. S. Veterans' Bureau and the commanding officer."

VIII. The exact date of the return of the property to the plaintiff has not been established, but when the property sold at the auction sale of May 26, 1922, had been removed, the premises were littered with débris resulting from the wrecking operations. The débris consisted in the main of pieces of concrete, wood lath, paper, joists, and various kinds of timber, tar paper and other roofing material, galvanized iron, terra cotta, pipe and other unusable and unsalable materials. The ground was cut up with a network of trenches, ranging in size from one approximately six feet wide and three feet deep and several hundred feet in length to many of substantially smaller dimensions. That portion of the topsoil covering the premises which had not been disturbed by building or excavation operations or by the building of roadways and walks, was very largely embedded with débris from the wrecking operations. The wire fence which had enclosed three sides of the property had not been replaced, and monuments which formerly marked the boundaries of the leased premises could not be found. A majority of the trees on the premises at the time the defendant took possesion under the lease was cut down and removed. This was necessary for the erection of hospital buildings and the reasonable use of the premises for hospital purposes. The planitiff knew and understood at the time the lease was executed the trees would be removed.

IX. In the use and occupation of the said premises during the period of the said lease, the defendant committed waste and damaged the said premises by the removal of the wire fence surrounding three sides of the premises; by the removal of the monuments which formerly marked the boundaries of the premises; by the disfiguration of the said premises by extensive excavations and cuts through the surface of the land; by the removal of the top-soil from a part of the premises, and by leaving that portion of the top-soil not disturbed by building or excavation operations embedded with pieces of concrete, wood lath, paper, joists, and various kinds of timber, tar paper and other roofing material, galvanized iron, terra cotta, and other materials. Said waste was not necessary to carry out the purposes for which the premises were leased, and the plaintiff thereby suffered damages to the extent of $5,350.

The court decided that plaintiff was entitled to recover, in part.

WILLIAMS, *Judge*, delivered the opinion of the court:

This is a suit to recover damages for injury to real estate due to waste alleged to have been committed by the defendant under a written lease made and executed by the parties December 13, 1917.

The plaintiff, for a consideration of $6.666 rental per month, leased to the defendant for one year from January 21, 1918, with an option to the defendant to renew said lease annually so long as the needs of the public might require, four acres of land, the same being a part of a 22-acre tract located in Staten Island, New York.

The premises were leased by the defendant for the purpose of erecting and operating thereon a clearing hospital for soldiers of the World War. Hospital buildings were constructed thereon and the premises were used by the defendant in the manner stated in the court's findings of fact, and were returned to the plaintiff some time after May 26, 1922.

There are no express stipulations in the lease requiring the defendant to return the premises at the termination of

its lease to the plaintiff in as good condition as when received, ordinary wear and tear excepted. It is not necessary that such a provision be incorporated in the lease in precise terms to make the defendant liable for damages resulting from a want of reasonable care in the use of the property. There is an implied covenant in every lease that the tenant will surrender the premises at the end of the term in as good condition as they were at the commencement of the lease, reasonable wear and tear and damages by the elements excepted.

In *United States* v. *Bostwick*, 94 U. S. 53, the court said:

"But in every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to so use the property as not unnecessarily to injure it, or, as it is stated by Mr. Comyn, 'to treat the premises demised in such manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by the willful or negligent conduct of the lessee.' Com. Land & Ten. 188. This implied obligation is part of the contract itself, as much so as if incorporated into it by express language. It results from the relation of landlord and tenant between the parties which the contract creates. *Holford* v. *Dunnett*, 7 M. & W. 352.

* * * * *

"As has been seen, that does not bind the United States to make good any loss which necessarily results from the uses of the property, but only such as results from the want of reasonable care in the use. It binds them not to commit waste, or suffer it to be committed."

The defendant is not required to make good any loss which necessarily resulted from the use of the premises leased from the plaintiff, but is required to make good any loss or damage resulting from a want of reasonable care of the property in its use.

This obligation rests on the defendant to the same extent, and in the same manner, as if such stipulation expressly appeared in the terms of the lease.

The plaintiff in its petition claims damages for loss occasioned by the cutting and removal of certain trees by the defendant. It appears the plaintiff knew and understood at the time of the execution of the lease that the use of the

Opinion of the Court

premises by the defendant for hospital purposes would necessarily require the removal of a part or all of the trees. Having had notice of the use the defendant would make of the premises, and that such use would result in the cutting and removal of the trees, the plaintiff if it expected compensation for such trees as might be removed, or their restoration at the termination of the lease, should have insisted upon such a covenant in the lease. The removal of the trees was a necessary act on the part of the defendant for the proper utilization of the premises for the purposes for which they were leased, and was not a voluntary waste resulting from the want of the exercise of reasonable care in the use of the premises.

The removal of the wire fence surrounding the premises, the removal of monuments marking the boundaries of the premises, the disfiguration of the surface of the premises by extensive excavations and cuts, rendering such premises unfit for use, the removal of the top soil from a part of the premises, and leaving the top soil, not disturbed by building or excavation operations, embedded with pieces of concrete, wood lath, paper, joists, and various kinds of timber, tar paper and other roofing material, galvanized iron, terra cotta, and other materials, were acts of voluntary waste, for which the defendant is liable in damages under the implied covenant in the lease that it would at the termination of its lease return the plaintiff's property in as good condition as when received, reasonable wear and tear, and damages by the elements excepted.

The findings show (Finding IX) that the amount of damages sustained by the plaintiff by reason of such waste amounted to $5,350.

The plaintiff is awarded judgment for that amount. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

ETTA M. KLEIN, FORMER ADMINISTRATRIX OF THE ESTATE OF SOLOMON KLEIN, DECEASED, AND ALSO INDIVIDUALLY AMY K. EISENDRATH, BERNICE K. FRIEDLANDER, AND LAWRENCE KLEIN v. THE UNITED STATES [1]

[No. J-124. Decided June 2, 1930]

On the Proofs

Estate-transfer tax; conveyance intended to take effect at grantor's death; conveyance of life estate; remainder to grantee contingent upon grantor's death; determination of taxable interest; constitutionality of revenue act; retroactive application.—

(1) Where the decedent, prior to passage of the revenue act of 1918, conveyed to his wife certain lands in the State of Illinois for and during her life, with the provision that should she die before he did the reversion in fee should remain vested in him, but that if she survived she should, by virtue of the conveyance, take, have, and hold the said lands in fee simple, the interest so conveyed included a contingent remainder which "was intended to take effect in possession or enjoyment at or after his death" within the meaning of section 402 (c) of the revenue act of 1918, and therefore subject to the estate-transfer tax.

(2) The taxable estate was the value of decedent's reversionary interest determined by deducting from the value of the property described in the deed the value of the grantee's life estate.

(3) Where the decedent died intestate after passage of the revenue act of 1918, the imposition of the tax was not by a retroactive application of the act, the transfer not being completed until the condition precedent, i. e., the decedent's death, took place. *Nichols* v. *Coolidge*, 274 U. S. 531, distinguished.

The Reporter's statement of the case:

Mr. Benjamin B. Pettus for the plaintiffs. *Mr. Edward Clifford* and *Colladay, Clifford & Pettus* were on the brief.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. W. T. Sabine* was on the brief.

[1] Certiorari applied for.

Reporter's Statement of the Case

The court made special findings of fact, as follows:

I. Etta M. Klein is the widow and Amy K. Eisendrath, Bernice K. Friedlander, and Lawrence Klein are daughters and son, respectively, of Solomon Klein, a citizen and resident of Chicago, Illinois, who died intestate September 17, 1919. Plaintiffs are the surviving heirs at law and next of kin of the decedent and the sole distributees of his estate. The widow was appointed administratrix of decedent's estate September 29, 1919, and duly qualified and acted in that capacity until December 7, 1920, when her final report showing the distribution of the balance of the estate to the plaintiffs herein was approved and she was discharged.

II. Within the time provided by the revenue act of 1918, the administratrix filed returns for the estate of decedent showing a total tax of $30,305.05 which was duly paid. Thereafter the Commissioner of Internal Revenue notified her in writing that upon an audit of the return as a result of an investigation thereof, the total tax liability of the estate was $67,397.56, and that an additional estate tax of $37,092.51 was due. Subsequently the commissioner reduced the amount of additional tax to $31,692.51. The administratrix paid $8,305 on March 8, 1923, and the balance of $23,387.51, together with interest in the amount of $1,922.25, was paid January 21, 1924. The additional tax to the extent of $23,387.51 resulted from the inclusion in the gross estate of the decedent of the value of certain parcels of real estate described in a deed hereinafter referred to from decedent to his wife, Etta M. Klein, dated July 1, 1918, the commissioner holding that the entire value of the property included in the deed constituted a part of decedent's gross estate as a transfer to take effect in possession or enjoyment at or after the decedent's death within the meaning of section 402 (c) of the revenue act of 1918. It is agreed by all of the parties that the conveyance was not in contemplation of death within the meaning of the statute.

III. The property, the value of which the Commissioner of Internal Revenue included in decedent's gross estate, consisted of two parcels of improved real estate in Cook County, Illinois, and the conveyance from the decedent to

his wife, Etta M. Klein, on July 1, 1918, so far as material here, was as follows:

"First: To have and to hold the said lands unto the said grantee for and during the term of her natural life, and if she shall die prior to the decease of said grantor then and in that event she shall by virtue hereof take no greater or other estate in said lands and the reversion in fee in and to the same shall in that event remain vested in said grantor, his heirs, and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance.

"Second: Upon condition and in the event that said grantee shall survive the said grantor, then and in that case only the said grantee shall by virtue of this conveyance take, have, and hold the said lands in fee simple, unto the sole use of herself, her heirs, and assigns forever.

"Said grantee covenants with said grantor that she will during the lifetime of said grantor promptly pay and discharge all taxes and assessments which may become due and payable on said lands, that she will keep all buildings and improvements situated thereon in good tenantable condition and repair and fully insured against loss by fire in companies acceptable to said grantor in the names of both said grantor and said grantee and in the event either of said buildings shall be destroyed or damaged by fire will apply all the insurance moneys received on account of such fire to the reconstruction or repair of the buildings damaged or destroyed, unless the said grantor shall in writing consent to otherwise invest the same in such manner that said grantee shall enjoy the income derived therefrom during her life and so that the capital shall belong to that one of the parties hereto who shall survive the other."

IV. June 10, 1927, the administratrix filed a claim for refund of $23,387.51, tax, and $1,922.25, interest paid, with interest on the aggregate sum from January 21, 1924, on the ground that possession and enjoyment to the grantee of the property conveyed by the decedent were not deferred until decedent's death and accordingly no part thereof should be included in the gross estate. Subsequently on August 24, 1927, the commissioner allowed the claim in part and rejected it to the extent of $13,705.92 and interest thereon of $1,126.51, on the ground that the last-mentioned amounts represented the tax and interest due as the result of the inclusion as a part of the decedent's gross estate of the

aforementioned parcels of real estate, after having deducted the value of the life estate of Etta M. Klein.

V. October 14, 1927, the commissioner refunded to the plaintiffs herein in equal proportions the amount of $10,-477.33 as tax overpaid and $2,330.81 as interest thereon in accordance with the ruling made on the claim for refund. Plaintiffs made application for reconsideration of the commissioner's decision, which application was denied December 21, 1927.

The court decided that plaintiffs were not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiffs contend, first, that under section 402 (c) of the revenue act of 1918, 40 Stat. 1097, Solomon Klein at the time of his death had no interest in the property in question which took effect in possession or enjoyment at or after that event; that the deed of conveyance transferred to his wife title to the lands in fee simple; that the conveyance was complete and irrevocable, and that the grantor retained no beneficial interest in the property conveyed but only a possibility of an interest through reversion; secondly, that if the decedent had an interest in the property at death, the same was not taxable, for under *Nichols* v. *Coolidge*, 274 U. S. 531, the revenue act of 1918 is unconstitutional in so far as it undertakes to tax transfers made before its passage.

By the terms of the deed here under consideration the decedent, until his death, had a vested reversion in fee to the property described subject only to the life estate therein provided for his wife, and to the possibility of its being divested by his death during her lifetime. The grantee had no more than a life estate in the property with a contingent remainder, which remainder was based upon a condition precedent, i. e., the death of her husband during her lifetime. Prior to the grantor's death the grantee did not and could not have a vested estate in remainder. Under the deed in question the possession or enjoyment of the rights and benefits of ownership of this remainder in the grantor could in no event be hers until her husband's death; the deed therefore

Opinion of the Court

to the extent of the value of this remainder interest reserved was a transfer intended to take effect in possession or enjoyment at the decedent's death within the meaning of section 402 (c) of the revenue act of 1918. The deed here in question was not an absolute conveyance forever in fee simple by the husband with a mere possibility of reverter but was a deed which expressly reserved and excepted the reversion and conveyed only a life estate to the wife with a contingent remainder, upon a condition precedent, i. e., the decedent's death during her lifetime. It is clear that it was the intent of the decedent, expressed in unambiguous language in the deed, that his wife should have only a life estate in the property during his lifetime and that only in case of his death during her lifetime should she have a remainder in fee in the land therein described. It appears to be well settled by the law of Illinois that such a condition precedent creates only a contingent remainder under the laws of that State. *Bayley* v. *Strahan*, 314 Ill. 213, 145 N. E. 359; *Wood* v. *Chase*, 327 Ill. 91, 158 N. E. 470; *Meldahl* v. *Wallace*, 270 Ill. 220, 110 N. E. 354; *Golladay* v. *Knock*, 235 Ill. 412, 85 N. E. 649; *Haward* v. *Peabody*, 128 Ill. 430, 21 N. E. 503.

The Commissioner of Internal Revenue included in the decedent's gross estate the value of his reversionary interest determined by deducting from the value of the property described in the deed, the value of the life estate of Etta M. Klein, as the interest of the decedent in the property which, under the deed, constituted a transfer and which took effect and passed to the wife in possession and enjoyment at his death. In this we think the commissioner was correct. The interest of which the decedent made a transfer intended to take effect in possession or enjoyment at his death was his entire vested reversion of the remainder in the property described in the deed. Until his death, however, the transfer was incomplete. Until that time the whole legal title to the fee, subject only to his wife's life estate, was vested in him as well as his vested remainder in fee of the entire reversionary interest. Until his death the possession or enjoyment by the decedent's wife of his vested remainder in fee was postponed. The decedent's death was the event which made the transfer complete and effective, and secured to Etta M. Klein

the possession and enjoyment of the property contemplated by the statute. The acquisition by the wife of the full benefits of ownership of interest which remained in the decedent became complete only upon his death. It was, therefore, a transfer at his death. *Saltonstall* v. *Saltonstall*, 276 U. S. 260; *Chase National Bank* v. *United States*, 278 U. S. 327; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *McCaughn* v. *Girard Trust Co.*, 11 Fed. (2d) 520; *Dean* v. *Willcutts*, 32 Fed. (2d) 374. We are of opinion, therefore, that the decedent had an interest in the property which was the subject of the instrument creating a life estate in his wife, the transfer of which interest took effect and was complete at his death, and that the value of this interest was a proper item to be included in the gross estate.

Relying upon *Nichols* v. *Coolidge*, *supra*, and the decisions of the United States Board of Tax Appeals in *Edward H. Alsop, Executor*, 7 B. T. A. 848; *James Duggan, Executor*, 8 B. T. A. 482; *David W. Crews Estate*, 8 B. T. A. 949; and *Edgar M. Morsman, Jr., Administrator*, 14 B. T. A. 108, the plaintiffs insist that inasmuch as the instrument in question was executed in July, 1918, the revenue act of 1918 in so far as it undertakes to tax a transfer made before its passage was unconstitutional. We think, however, that the decision in *Nichols* v. *Coolidge*, *supra*, goes no further than to hold that where a donor has made a *completed gift inter vivos* not in contemplation of death and prior to the enactment of the act under which the tax is sought to be exacted and where by such transfer he has divested himself of all further control or any other disposition of the property than that provided in the instrument of transfer, any attempt to tax such a gift merely because the transfer was intended to take effect in possession or enjoyment at or after death is arbitrary, capricious, and amounts to confiscation. In such cases there would be no transfer by death, but the property would pass under the provisions of the deed of gift or trust.

In that case Mrs. Coolidge and her husband had executed an instrument in 1907 in which they conveyed property in trust, the income to be paid to them during the life of either of them with remainders over to their sons. Later, in

1917, four years prior to the death of either of them, they assigned all their interest in the income and in the fund itself to their sons, the remaindermen. No claim was made that the gift *inter vivos*, thus completed, was made in contemplation of death and as they had divested themselves of every interest in the property, the value of the property transferred by Mrs. Coolidge was held to have been improperly included in her gross estate. In so holding the court said:

"The statute requires the executors to pay an excise ostensibly laid upon transfer of property by death from Mrs. Coolidge to them but reckoned upon its value plus the value of other property conveyed before the enactment in entire good faith and without contemplation of death. Is the estate, thus construed, within the power of Congress?

* * * * *

"* * * And we must conclude that section 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious, and amounts to confiscation."

The language quoted is very broad but we think in view of subsequent decisions of the court its application to "property transferred" refers to *completed transfers* of property where no interest of value is transferred by death. The transfer there involved, if not complete and beyond control of the donors in 1907, had been completed four years before the death of Mrs. Coolidge. She had divested herself of every interest in the property at that time and neither possession nor enjoyment was postponed until her death. This view finds support in subsequent decisions of the court in *Chase National Bank* v. *United States*, *supra*, and *Reinecke* v. *Northern Trust Co.*, *supra;* in the latter case the court in referring to two trusts created in 1903 and 1910, respectively, and distinguishing the *Coolidge case*, at page 345, said:

"As to the two trusts, it is argued that since they were created long before the passage of any statute imposing an estate tax, the taxing statute if applied to them is unconstitutional and void, because retroactive, within the ruling of

Nichols v. *Coolidge*, 274 U. S. 531. In that case it was held that the provisions of the similar section 402 of the 1918 act, 40 Stat. 1097, making it applicable to trusts created before the passage of the act was in conflict with the fifth amendment of the Federal Constitution and void, as respects transfers completed before any such statute was enacted. But in *Chase National Bank* v. *United States*, decided this day, *ante*, p. 327, the decision is rested on the ground, earlier suggested with respect to the fourteenth amendment in *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 271, that a transfer made subject to a power of revocation in the transferror, terminable at his death, is not complete until his death. Hence section 402, as applied to the present transfers, is not retroactive, since his death followed the passage of the statute. For that reason, stated more at length in our opinion in *Chase National Bank* v. *United States*, *supra*, we hold that the tax was rightly imposed on the transfers of the corpus of the two trusts and as to them the judgment of the court of appeals should be reversed."

At pages 346–348, the court in connection with certain trusts created in 1919 which were held not to be taxable as a part of the estate pointed out that the reserved powers of management did not save to decedent any control over the economic benefits or the enjoyment of the property and that the shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made, and said—

"The two sections, read together, indicate no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death, where he has retained no such control, possession, or enjoyment. In the light of the general purpose of the statute and the language of section 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in section 402 (c) 'to take effect in possession or enjoyment at or after his death,' include any others than those passing from the possession, enjoyment, or control of the donor at his death and so taxable as transfers at death under section 401."

In our opinion the same rule as was applied to the trusts created in 1903 and 1910 must be applied where, by the reservation of a remainder or reversion in fee, as in this case, in the grantor or donor until his death, the transfer is not complete; and the act in force at the date of the deced-

ent's death taxing the interest which passes at death is neither retroactive nor unconstitutional. Cf. *Cooper* v. *United States*, 280 U. S. 409, decided February 24, 1930, and *May et al., Executors*, v. *Heiner*, 281 U. S. 238, decided April 14, 1930. The date of the execution of the trust, or conveyance, is not controlling but the important thing is whether under such instruments there remains in the decedent any interest in the property which passes at his death. In this case we think there was such an interest.

Plaintiffs are not entitled to recover and the petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

McLAIN ROGERS v. THE UNITED STATES

[No. H-411. Decided June 2, 1930]

On the Proofs

Income tax; business losses; isolated transactions by taxpayer.—The words "trade or business" as used in sec. 204 (a), revenue act of 1921, defining deductible net losses as those "resulting from the operation of any trade or business regularly carried on by the taxpayer," refer to a regular occupation or calling of the taxpayer for the purpose of livelihood or profit, and isolated transactions are not sufficient to constitute a business or trade.

The Reporter's statement of the case:

Mr. Harry D. Murray for the plaintiff.

Mr. Joseph H. Sheppard, with whom was *Mr. Charles F. Kincheloe*, for the defendant. *Mr. Assistant Attorney General Herman J. Galloway* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff is a citizen of the United States and over the age of twenty-one years and resides at Clinton, Oklahoma. He is a physician and surgeon.

II. For approximately ten years prior to 1921, the plaintiff invested the surplus income from his profession in

Reporter's Statement of the Case

stocks, bonds, and oil, mining, and real property. Such transactions from 1914 to 1923 are as follows:

Year bought	Description	Amount, shares	Sold or held
	STOCKS AND LEASES		
1914	Arkansas River Shed Oil Co	20 shares	Held.
1914	Eli Oil Co	6 shares	Do.
1914	Manford Oil Co	do	Do.
1916	Oil lease, S. ½ NE. ¼ sec. 4, twp. 4, S., R. 1 W., Carter, Okla.		
1916	Oil lease, 1/16 interest, 316 acres, Carter County, Okla		
1916	R. T. Steward Inv. Co., 3 3/10 shares	$1,200	Do.
1917	Oklahoma State National Bank	10 shares	Sold.
1917	Security National Bank	do	Do.
1917	15th Street Zinc Mine, Joplin, Mo	$10,000	Do.
1917	Oil lease, NE. ¼ of SE. ¼ sec. 25, twp. 3 S., R. 1 W, Carter County, Oklahoma.		
1917	Shoe Boy Townsite Co., 210 shares	$21,000	Part sold.
1918	Cullinan Oil Ass'n	$1,750	Sold.
1918	Oil lease in sections 24 and 30, Stephens County, Oklahoma.	$2,500	
1918	Pershing Mining Co	$2,000	Held.
1918	First State Bank of Leedey, 10 shares	$1,000	Sold.
1919	Clinton Alfalfa Milling Co., 10 shares. Business was taken over by the creditors and sold at a heavy loss.	$1,000	
1919	Security National Bank, 10 shares		
1919	Clinton Milling Co., 10 shares	$5,000	Do.
1920	Weatherford Milling Co., 126¼ shares	$36,250	Do.
1921	½ interest in lease and royalty, 15 acres, NW. ¼ of NW. ¼ of N. ¼ of NW. ¼ sec. 21, range 4 west, Jefferson Co., Oklahoma.	$500	
1923	Interest in oil lease in Blaine County, Okla	$400	Held.
	REAL ESTATE		
1919	Lots 1 to 4, incl., block 3, Shoe Boy Add., Clinton, Okla	$5,000	Held.
1919	Lots 6 to 12, incl., block 11, Hayes Add., Clinton, Okla	$10,400	Sold.
1917	½ interest in farm in Carter County, Okla	$3,000	Held.
1919	Lots 8 and 9, block 47, Arapahoe, Okla	$1,800	Sold.
1919	Undivided interest in Alexander estate, Love County, Okla.	$5,793.19	Held.
1919	Lots 18, 19, 20, block 36, Clinton, Okla	$7,500	Sold.
1920	65 resident lots, Clinton, Okla	$6,500	Part sold.
1922	240-acre farm in Dewey County, Okla	$2,500	Sold.

The plaintiff has an office in the hospital building opposite his regular professional office, in which he employs a clerk to handle the details of his business transactions.

No separate books were kept by the plaintiff relating to these business enterprises nor was the income therefrom kept separate from the income from his professional practice.

III. In the year 1920 plaintiff bought 126¼ shares of stock in the Weatherford Milling Company, of Weatherford, Oklahoma, an Oklahoma corporation, paying for the same $36,250, this 126¼ shares representing one-quarter of 505 shares of stock of the said corporation which plaintiff and three copurchasers secured from the majority of stock-

holders of the corporation, paying in all $145,000 for the 505 shares. Shortly thereafter the company became insolvent and required considerable refinancing, which appeared beyond the means of the four purchasers of said stock, of which plaintiff was one of the purchasers. An agreement was made with J. W. Maney and John Maney, of the State of Oklahoma, whereby the Messrs. Maney would undertake the operation of the milling company and assume all outstanding obligations when and only upon condition the plaintiff and his copurchasers surrendered and relinquished all their stock. The said obligations assumed by the Messrs. Maney consisted of negotiable paper endorsed by the plaintiff and his said copurchasers. The plaintiff and his copurchasers surrendered their stock to the Messrs. Maney about December, 1922.

Plaintiff suffered a loss of $36,250 on this transaction.

IV. In his income-tax return for the calendar year 1921 the plaintiff deducted the sum of $5,625 of the loss sustained in the aforesaid stock; in his return for the year 1922 he deducted $12,867; and in his return for the year 1923 he deducted $14,516 of such losses.

The Commissioner of Internal Revenue disallowed the deductions for the years 1922 and 1923, and on December 15, 1925, assesed an additional tax against the plaintiff in the sum of $1,992.82. Thereafter, and on May 13, 1926, the said commissioner made a further assessment against plaintiff in amount of $279.53, covering interest on the aforesaid additional tax.

On June 4, 1926, plaintiff paid to the collector of internal revenue the amount of the aforesaid assessments, totalling $2,272.35, and, on June 12, 1926, filed a claim for refund thereof, which was rejected on August 27, 1926.

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff in this case sues to recover $2,272.35, which is alleged to be an overpayment of taxes for the years 1922 and 1923.

The plaintiff during the years in question was a practicing physician and surgeon at Clinton, Oklahoma. He had been located at Clinton for several years and enjoyed a lucrative practice in his profession. For approximately 10 years prior to 1921 the plaintiff from time to time invested the surplus income from his profession in stocks and bonds, oils, mining, and real estate.

In October, 1920, he purchased 126¼ shares of stock of the Weatherford Milling Company, an Oklahoma corporation, for which he paid the sum of $36,250. The shares purchased by the plaintiff represented one-quarter of 505 shares in the company purchased by the plaintiff and three copurchasers. After the purchase of these shares by the plaintiff and his associates the milling company became involved in financial difficulties. Heavy obligations had been incurred and the company was facing bankruptcy. Facing this situation and not being in a position to do the refinancing necessary to put the company on a solvent basis, the plaintiff and his copurchasers who owned practically all the shares of stock, entered into a contract with J. W. Maney and John Maney whereby it was agreed the said Messrs. Maney would take over and undertake the operation of the company and assume all outstanding liabilities in return for the surrender of the shares of stock then owned by the plaintiff and his three copurchasers. The said agreement was carried out, and in December, 1922, the plaintiff surrendered to Messrs. Maney the 126¼ shares of stock in the company acquired by him as aforesaid.

The plaintiff in this transaction suffered a total loss of the amount originally paid by him for the said shares, to wit, $36,250.

In his income-tax return for the calendar year 1921 the plaintiff deducted the sum of $5,625 of the loss sustained in the aforesaid stock, in his return for the year 1922 he deducted $12,867, and in his return for the year 1923 he deducted $14,516 of such losses.

The Commissioner of Internal Revenue disallowed the deductions for the years 1922 and 1923, and on December 15, 1925, assessed an additional tax against the plaintiff in the sum of $1,992.82. Thereafter, and on May 13, 1926, the

said commissioner made a further assessment against plaintiff in amount of $279.53, covering interest on the aforesaid additional tax.

On June 4, 1926, plaintiff paid to the collector of internal revenue the amount of the aforesaid assessments, totaling $2,272.35, and, on June 12, 1926, filed a claim for refund thereof, which was rejected on August 27, 1926.

The plaintiff claims he was entitled to the deductions taken by him for the years stated by virtue of the provisions of section 204 (a) and (b) of the revenue act of 1921 (42 Stat. 227), which reads:

"Sec. 204 (a). That as used in this section the term 'net loss' means only net losses resulting from the operation of any trade or business regularly carried on by the taxpayer (including losses sustained from the sale or other disposition of real estate, machinery, and other capital assets, used in the conduct of such trade or business). * * *

"Sec. 204 (b). If for any taxable year, beginning after December 31, 1920, it appears upon the production of evidence satisfactory to the commissioner that any taxpayer has sustained a net loss, the amount thereof shall be deducted from the net income of the taxpayer for the succeeding taxable year, and if such net loss is in excess of the net income for such succeeding taxable year, the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year * * *."

Article 1601 of Treasury Regulations No. 62 reads:

"1601. Net losses, definition and computation: The term 'net loss' as used in the statute means only a net loss resulting from the operation during the taxable year of any trade or business regularly carried on by the taxpayer. Included therein are losses from the sale or other disposition of real estate, machinery, and other capital assets used in the conduct of such trade or business. In order to be entitled to claim an allowance for a 'net loss' the taxpayer must have suffered an actual net loss in a trade or business during the taxable year * * *."

The words "trade or business" as used in the statute in connection with losses have been held by the courts to mean and refer to a regular occupation or calling of the taxpayer for the purpose of livelihood or profit. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171; *Allen* v. *Commonwealth*, 188 Mass. 59, 74 N. E. 287.

While it has been recognized and held by the courts and by the Board of Tax Appeals that a person can be engaged in more than one trade or business and that it is not necessary that the trade or business in which a deduction is sought forms a taxpayer's principal trade or business, it is required that his activities shall be such that they may of themselves be regarded as an occupation or business. A single isolated activity or transaction is not sufficient to constitute a business or trade. *J. J. Harrington*, 1 B. T. A. 11, *Fridolin Pabst*, 6 B. T. A. 843, *Harry J. Gutman*, 7 B. T. A. 500.

In *Mente* v. *Eisner*, 266 Fed. 161, the court said:

"We think that the language 'losses incurred in trade' is correctly construed by the Treasury Department as meaning in the actual business of the taxpayer as distinguished from isolated transactions. If it had been intended to permit all losses to be deducted it would have been easy to say so. Some effect must be given to the words 'in trade.'"

The plaintiff contends that aside from following his profession as physician and surgeon he was also a broker and capitalist, and that the loss sustained in the purchase of the shares of stock in the Weatherford Milling Company resulted from his activities in such avocation.

Section 204 (a) and (b) of the revenue act of 1921 provides that a loss, in order to be deductible as a "net loss," must not only have been incurred from the operation of a trade or business, but from a trade or business regularly carried on by the taxpayer.

Under the rule that a trade or business regularly carried on must be held to mean a vocation and not occasional or isolated transactions, we are of the opinion the loss sustained by the plaintiff in the transaction involving the purchase of the shares of stock in the Weatherford Milling Company was not a loss sustained from the operation of a trade or business regularly carried on by him within the meaning of the statute.

During the year 1920, in which the plaintiff purchased the shares of the Weatherford Milling Company, he had no other transaction of any kind in stocks and leases, and had no real-estate transaction. The purchase of these shares

constituted his sole and only transaction as a capitalist and broker.

For the year 1921 he purchased one-half interest in a lease and royalty in Jefferson County, Oklahoma, for the sum of $500. He did not purchase or sell any real estate during the year.

During the year 1922 he made no purchase or sale of stocks or leases and his activity as a broker and capitalist was confined to the purchase of a 240-acre farm in Dewey County, Oklahoma.

For the three years 1920, 1921, and 1922, aside from the purchase of the shares in the Weatherford Milling Company, the plaintiff engaged in but three transactions in the purchase and sale of stocks, leases, and real estate. This was the extent of his activities in the avocation of broker and capitalist and falls far short of the requirements of section 204 (a) "that as used in this section the term 'net loss' means only net losses resulting from the operation of any trade or business regularly carried on by the taxpayer."

These transactions were undoubtedly merely the occasional investment by the plaintiff of the income derived from his professional practice as a doctor and surgeon. They were isolated transactions and do not constitute the operation of a trade or business regularly carried on by the plaintiff.

In view of our decision that the loss sustained by the plaintiff did not result from the operation of a trade or business regularly carried on by him, it will not be necessary for us to discuss or pass upon the other points raised in the case.

The commissioner was correct in his ruling denying the deductions sought by the plaintiff and in denying the claim for refund.

Plaintiff's petition is dismissed. It is so ordered.

GREEN, *Judge*, and BOOTH, *Chief Justice*, concur.

LITTLETON, *Judge*, dissenting:

While the facts proved by plaintiff as to his activities in connection with his purchases and sales of real and personal property over a period from 1914 to 1923, inclusive, are not

as satisfactory as I should desire, or as might easily have been established had these matters been gone into at the time the testimony was taken, I am, however, of the opinion that the facts established in relation to the plaintiff's transactions outside of his profession as a physician are sufficient to justify the conclusion that these transactions and the time spent by him in connection therewith constituted a business regularly carried on within the meaning of section 204 of the revenue act of 1921, 42 Stat. 227.

It is established that plaintiff employed a clerk and a business manager to look after his transactions outside of his profession as a physician and surgeon. For a number of years he had one Carlos Sewell, a business man in his employ, to look after his business interests. Grace Irwin, who was an officer of the Clinton Hospital and Training School where the plaintiff was principally engaged as a physician and surgeon, assisted him in keeping his records relating to his business transactions and, as Carlos Sewell, who had been in the plaintiff's employ, had moved to California, L. Tooker was employed as plaintiff's business manager subsequent to the taxable years here involved. Plaintiff devoted about one-third of his time to his business matters outside of his profession. This fact is established by the testimony of the plaintiff and one other witness, and it is not contradicted. The plaintiff devoted the forenoon of each day almost exclusively to his profession as a physician and surgeon.

I do not think that plaintiff can be regarded as a capitalist or as a broker, but I do think that his business dealings over the years from 1914 to 1923, inclusive, and the time devoted thereto, as established by the facts, are sufficient to constitute a business entitling him to the benefits of the net-loss provision of section 204 of the revenue act of 1921. The transactions which the plaintiff had were not few and isolated, although he may have had only one or two transactions in a particular year. Such transactions must be viewed in the light of all of the plaintiff's similar business interests, the character of those interests, and the time and attention devoted thereto by himself and those employed by him. *Eysenbach*, 10 B. T. A. 716; *Brickell*, 17 B. T. A. 711; *Crane*,

17 B. T. A. 720; *Baker*, 17 B. T. A. 733. The purpose of section 204 was to relieve from the harsh rule that required one's tax liability to be determined solely from the happenings of a twelve-month period. It is a relief provision and should be liberally construed. *Marston*, 18 B. T. A. 558. Treasury Decision 2090 would seem to include plaintiff within the terms of the definition of a loss incurred in trade as defined by the Treasury Department. In that Treasury Decision it is said: "The term 'in trade' as used in the law * * * is held to mean the trade or trades in which the person making the return is engaged; that is, in which he has invested money otherwise than for the purpose of being employed in isolated transactions and to which he devotes at least a part of his time and attention." In Treasury Decision 1989 it is stated: "In trade is synonymous with *business*. Business has been defined as—That which occupies and engages the time, attention, and labor of any one for the purposes of a livelihood, profit, or improvement; that which is his personal concern or interest; employment, regular occupation, but it is not necessary that it should be his sole occupation or employment." Had the purchase by the plaintiff in 1920 of the 126¼ shares of stock of the Weatherford Milling Company at a cost of $36,250 and the surrender thereof at a loss in that amount in December, 1922, been the only transaction had by the plaintiff over a period of years outside of his profession, I should agree that he would not be entitled to the benefits of the net-loss provision of section 204. But even aside from the various other dealings in prior and subsequent years, this was not the only business transaction he had outside of his profession in 1920, for it appears that in that year he purchased 65 residence lots in Clinton, Oklahoma, and sold a portion of them, and in 1922 when he surrendered the stock in the Weatherford Milling Company and sustained the loss he also purchased a 240-acre farm in Dewey County, Oklahoma, and sold the same in that year. With the exception of the year 1915, it appears that he had business transactions in the purchase or sale, or both purchase and sale, of real or personal property in every year from 1914 to 1926. In view of the facts established with reference to the number of transactions engaged

in by the plaintiff, the fact that he devoted about one-third of his time to these matters and the fact that he employed others to assist him, I am of opinion that under the statute he should have the benefit of whatever net loss he sustained in 1922 as a deduction from his income for that year and that whatever excess remains should be deducted from his income for 1923.

It is clear from the evidence that plaintiff did not sustain the net loss until December, 1922, and his action in using a portion of it to reduce his income for 1921 was not justified.

Defendant insists that inasmuch as the plaintiff has not established all the essential facts necessary to a computation of the amount of the net loss which may be used to reduce the net income for 1922 and 1923, as required by the provisions of section 204 (a), *Schlesinger*, 5 B. T. A. 943; *Montgomery*, 17 B. T. A. 1308, the court should dismiss the petition even if it finds that he was engaged in a business regularly carried on within the meaning of that section. It appears that the Commissioner of Internal Revenue made no examination of plaintiff's books and records in connection with his disallowance of the loss claimed and made no computation of what the deductible net loss in 1922 and 1923, if there was one, would be; but entry of judgment as to the amount of the net loss, if any, can be withheld to enable the parties to stipulate the facts necessary to such determination or to enable the plaintiff to establish the amount of such loss by proof of the necessary facts.

It is further insisted by the defendant that section 204 of the revenue act of 1921 confides in the Commissioner of Internal Revenue a discretionary power, in the allowance of a claim for "net losses" and that his action is not subject to review by this court. There is no merit in this contention. The establishment of the loss is an ordinary question of fact of a nature which the courts constantly review in suits for the refund of taxes. The provisions of the statute that "If for any taxable year beginning after December 31, 1920, it appears upon the production of evidence satisfactory to the commissioner that any taxpayer has sustained a net

loss," repose in the commissioner no such discretionary power as may not be reviewed by the courts. *Boyle Valve Co.* v. *United States*, 69 C. Cls. 129.

It seems to me, therefore, that the court should hold that the plaintiff is entitled to recover and that entry of judgment should be withheld to enable the parties to submit a computation of the amount of the deductible net loss.

AMERICAN MILK PRODUCTS CORPORATION v. THE UNITED STATES

[No. J-589. Decided June 2, 1930]

On the Proofs

Income tax; tentative return; failure to file final return within extension of time; reasonable cause for delay; penalty.—(1) Where the taxpayer in March of 1926 filed a tentative income-tax return for the year 1925 and having been granted extensions of time for filing a final return failed to file the same within the time limit granted, owing to incorrect notation by the taxpayer of the extension permitted, the cause of the delay was not a reasonable one within the meaning of the statute providing no imposition of penalty where the failure "was due to a reasonable cause and not to willful neglect," and there can be no recovery of the penalty assessed.

(2) The tentative return, so made, was not the return required by law, and did not satisfy the requirement of the statute.

Same; computation of penalty; amount of delinquency.—The proper amount of the penalty, under the statute, was 25 per cent of the entire tax, and not a percentage of the tax that was delinquent.

Same; measure of penalty.—The penalty imposed is a means of punishment, and the tax is only the measure of it.

Same; compromise of penalty; authority of court.—The authority of the Commissioner of Internal Revenue to compromise a tax penalty does not imply such authority in the court.

The Reporter's statement of the case:

Mr. Jacob S. Seidman for the plaintiff.

Messrs. Lisle A. Smith and *John H. Pigg*, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation, engaged in foreign sales and exportation of milk products exclusively with foreign trade.

II. The business of the plaintiff is transacted abroad through subsidiary companies, branches, agents, traveling salesmen, and direct by mail. In 1925, the year in question, the plaintiff had two subsidiary corporations, one in England and one in France, two branches, one in Cuba, and the other in China, and twenty-seven agencies located in Germany, Africa, Argentina, Bermuda, Bolivia, Brazil, British Honduras, Colombia, Costa Rica, Dominican Republic, Dutch West Indies, Ecuador, Guatemala, Haiti, Honduras, Japan, Mexico, Panama, Paraguay, Peru, Salvador, Straits Settlements, Turkey, Uruguay, and Venezuela. The volume of business transacted in the year 1925 was approximately $4,000,000 without its subsidiaries, and approximately $7,000,000 with its subsidiaries.

III. In the year 1926 plaintiff filed a tentative Federal income-tax return under the provisions of Treasury Decision 3827 and paid upon submission of the tentative return the sum of $1,248 on March 11, 1926, which represented 24 per cent of a reported tax of $5,200 for the year 1925. The plaintiff was allowed two months from March 15, 1926, to submit a final return. On April 16 plaintiff made a request to the collector of internal revenue, Treasury Department, Washington, D. C., and also a request in a letter under date of April 21, addressed to Collector of Internal Revenue, Customs House, New York City, for an extension of time until June 15, 1926, in order to obtain complete figures for the completion of the final return. On April 30, 1926, plaintiff was granted an extension until June 15, 1926, within which time it should submit its final return.

IV. The assistant secretary and treasurer, a Mr. Sidney R. Major, who had complete charge of the payment of all bills, taxes, and accounts by the plaintiff corporation, erroneously made note that final return date was extended to June 30, 1926, instead of correct date of June 15, 1926. On June 14, 1926, plaintiff submitted a check for $1,248 representing the payment of the second installment of the 1925 tax as estimated on March 11, 1926, upon the submission at that

time of its tentative return. On June 21, 1926, plaintiff concluded that it would need an additional extension of time until July 15 to file its final return, but an examination of its files disclosed to Mr. Major that the last extension ran until June 15, 1926, and not June 30, 1926, as he had erroneously believed from a notation which he had made with reference thereto. Thereupon (June 21, 1926), he wrote to the collector at New York, asking for further extension of time to July 15, and not receiving any immediate reply, he shortly afterwards made a verbal request for the additional extension of time in which to file plaintiff's final return, which was not granted. Later, and on June 29, the collector wrote in answer to the letter written by Mr. Major that the request should have been made before the expiration of the previous extension to June 15, 1926, and "as the additional extension may not be granted at this time, it is suggested that an affidavit accompany your return, explaining the delay in filing."

V. On June 28, 1926, plaintiff prepared a return from such figures as were available, showing a tax due of $7,874.20, and sent this return together with a check for $1,453.70 to the collector. This check together with the previous payments amounted to 50 per cent of the tax, with the interest required by law.

The third and forth installments were paid together in the sum of $3,937.10. When the final figures were received by the plaintiff, it filed an amended return showing a tax of $7,820.18, which indicated that the preliminary return submitted on June 28, 1926, for the sum of $7,874.20 overstated the tax in the sum of $54.02. The amount of tax unpaid at the expiration of the extension time, according to the amended return, was $5,324.18.

VI. Plaintiff was assessed an additional sum of $1,970.36, which represented a 25 per cent penalty upon the total tax of $7,820.18, for its failure to file a return on June 15, 1926. Plaintiff paid the above penalty in the amount of $1,970.36 on December 20, 1926.

VII. On July 8, 1927, plaintiff filed with the collector of internal revenue for its district its claim for refund in the sum of $1,970.36 for recovery of the payment of the penalty

assessed against it for failing to file its return within the period of the extension and stating that the delay in filing was due to the fact that it was under the impression that an extension of time had been granted to June 30, 1926, instead of June 15, 1926.

This claim for refund was rejected on the ground that the reason given for the delay in filing does not constitute a reasonable excuse and that the collector had no authority to refund amounts collected in settlement of penalties legally due.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff in this case failed to file its return for the year 1925 within the time fixed by an extension granted by the commissioner. On account of this failure a penalty was assessed against it in the sum of $1,970.36, which it paid, and having duly filed a claim for the refund thereof, which was rejected, brings this action to recover this amount with interest, alleging that its failure to file a return within the time fixed by the commissioner was due to a reasonable cause within the meaning of the statute. The issue in the case is whether the commissioner erred in assessing this penalty.

There is no dispute about the material facts in the case. It appears from the evidence that the plaintiff first filed a tentative return of its taxes and then in April, 1926, made application for an extension until June 15, 1926. On April 30, 1926, plaintiff was granted an extension until June 15, 1926, in which to file its final return. Its assistant secretary and treasurer, who had complete charge of payment of taxes erroneously made a note that the final return date was extended to June 30, 1926, instead of the correct date of June 15, 1926. On June 21, 1926, plaintiff concluded that it would need an additional extension of time until July 15 to file its final return, but an examination of its files disclosed that the last extension ran until June 15, 1926, and not June 30, 1926. Thereupon, plaintiff wrote to the collector at New York asking for further extension of time to July 15, and, not receiving any immediate reply, shortly after-

wards made a verbal request for the additional extension of time in which to file its final return, which was not granted. Plaintiff was directed to file its return immediately, and a return was accordingly submitted on June 28, 1926, which finally turned out to be for $54.02 too much tax. Thereafter the plaintiff was assessed the penalty of $1,970.36 as above stated.

The statute under which this penalty was assessed provides in substance that where the failure to file a return within the time prescribed by the commissioner " was due to a reasonable cause and not to willful neglect, no such addition (penalty) shall be made to the tax." The question in the case is whether under the circumstances there was " reasonable cause " for the failure to make the return in time.

The question of whether there was reasonable cause is one of fact to be decided in the first instance by the commissioner under all of the circumstances in the case. We can not reverse his decision unless upon all of the evidence it appears that he erred in determining that there was no reasonable cause for not filing the return within the time fixed. The plaintiff urges that the tax as finally paid by it in installments amounted to $54.02 more than was finally determined to be due, but this has nothing to do with the question of whether its officers had reasonable cause for not filing the return in time. The plaintiff's official who had charge of the matter made application for an extension to a certain time, namely June 15, 1926. The collector answered acknowledging the receipt of an application for an extension of time to this date and stating also that there was " attached a further extension of time to June 15th, 1926." Considering the fact that this was the time fixed in plaintiff's own application and that the date was repeated twice in the letter from the collector, we can not say that the commissioner erred in holding that the excuse given for not filing the return in time, namely, that the officer of plaintiff who had the matter in charge noted the date as June 30, 1926, was not a reasonable one.

The plaintiff also complains that notwithstanding it paid the tax in accordance with its second return, the penalty was assessed on the whole amount of the tax instead of upon

the difference between the estimated amount as fixed in the original tentative return and the amount finally determined. But the so-called tentative return was, as we have heretofore held, not the return provided for in the statute and properly speaking no return at all, but merely an estimate of the tax due. The second return made by the plaintiff was filed after the expiration of the time fixed in the second extension. The plaintiff could not escape a penalty by a return filed after the expiration of the extension. So far we think the rule is clear, but in a case like the one under consideration the question of upon what amount the penalty should be computed is a difficult one. The statute requires the penalty of twenty-five per cent to be computed on "the tax." Do the words "the tax" mean the tax as shown by the return, or the tax that was delinquent? If the latter, the first two payments having been made before the tax was assessed and before any of it became delinquent under the extension granted, then the amount of these two payments should be deducted before computing the penalty. The penalty with which we are here concerned is distinctly for failure to file a return at the time required by the statute, or within the time as extended by the commissioner, and has nothing to do with the various other penalties provided by the revenue act of 1924 for negligence, for which a penalty of 5 per cent of the deficiency is provided, section 275, or for making a false or fraudulent return, for which a penalty of 50 per cent of the deficiency is provided by section 275. If the tax is not paid on time, interest at 1 per cent per month is provided, but no specific penalty for failure to pay the tax in time is provided. Section 227 (a) of the revenue act of 1924 provides for the date on which the return shall be filed and gives the commissioner the right to grant a reasonable extension of time for filing if application therefor is made before the date prescribed by law for filing the return and section 270 of the act sets forth the dates on which the tax shall be paid. Section 3176 of the Revised Statutes, as amended by section 1311 of the revenue act of 1921, provides that in the case of any failure to make and file a return within the time prescribed by law, or prescribed by the commissioner or the collector in pursuance of law, the commis-

sioner *shall add to the tax* 25 per centum of its amount, except that when a return is filed after such time and it is shown that the failure to file was due to a reasonable cause no such addition shall be made to the tax. Under the provisions of this section we think it was intended that the penalty for not making the return in time was to be computed upon the total of the correct tax and not upon the amount of tax delinquent at the time the return was made. Conceivably a taxpayer might under a tentative return or upon an extension of time to file, remit an amount which might ultimately be found to equal the correct tax and never file the return required by the statute. It is clear that in such case he could not escape the penalty notwithstanding all the tax was paid, and the situation is certainly no better or different where he has paid only a portion of the tax. The penalty imposed is a means of punishment, *United States* v. *Childs*, 266 U. S. 304, and the tax is only the measure of it. The payment of a portion of the tax in nowise mitigates the infraction for which the penalty is exacted. It is urged on behalf of plaintiff that penalties under such circumstances as arise in the case at bar were often compromised by the Bureau of Internal Revenue for comparatively small sums. This may be true, since the commissioner is given authority by R. S. 3229 to compromise a tax or penalty. However, we have no authority to make any compromises, but must take the statute as we find it.

The cases cited in support of plaintiff's position are not parallel in the facts although some of the language used might tend to support plaintiff's case. In the case of *Cohn & Sons Co.*, 9 B. T. A. 87, which seems to be especially relied upon, a return was filed and taxes paid under the 1917 act, but a further return required by the 1918 act was not filed in time. In that case the board held that the penalty should only be assessed on the additional amount imposed by the 1918 act. But in that case there had been a legal return and taxes paid in accordance with it; in this case there was no legal return until after the expiration of the time fixed by the extension.

The claim for refund is merely for the amount of the penalty assessed and does not include the amount of any

overpayment. The commissioner computed the penalty upon the correct tax for the year 1925 and this suit is brought only for the recovery of the amount of the penalty. It follows that plaintiff's petition must be dismissed, and it is so ordered.

WILLIAMS, *Judge*; LITTLETON, *Judge*; and BOOTH, *Chief Justice*, concur.

E. W. BLISS COMPANY v. THE UNITED STATES

[No. C-1032. Decided June 2, 1930]

On the Proofs

Contract; increase of wages; release; reformation.—Upon a special finding that releases executed by plaintiff upon completion of its fixed-price contracts with the Government were not intended by either party to release the Government from liability for wage increases which it put into effect on said contracts in plaintiff's plant under an agreement to reimburse the plaintiff therefor, the court, under its power to reform a contract, gave judgment for the plaintiff. See 61 C. Cls. 777; 275 U. S. 509.

The Reporter's statement of the case:

Messrs. George A. King, Bynum E. Hinton, and *George R. Shields* for the plaintiff.

Messrs. Assistant Attorney General Charles B. Rugg and *Louis R. Mehlinger* for the defendant. *Messrs. Assistant Attorney General Herman J. Galloway* and *Charles F. Kincheloe* were on the briefs.

The court made special findings of fact, as follows:

I. The E. W. Bliss Company, plaintiff herein, was at the time of the filing of this action, and is now, a corporation duly organized under the laws of the State of West Virginia, and doing business in the borough of Brooklyn, city and State of New York.

II. During the year 1918, and for some time prior and subsequent thereto, plaintiff corporation was engaged in the manufacture of torpedoes under formal contracts with the United States as follows:

Contract dated May 3, 1915, referred to as contract No. 500, by the terms of which plaintiff obligated itself to manufacture 120 torpedoes, gyros, etc., for a specified price each, totaling $705,444.12, deliveries to be in lots of 5 and to be completed within 24 months from the date of the contract.

Contract dated November 9, 1915, referred to as contract No. 510, by the terms of which plaintiff obligated itself to manufacture 240 torpedoes, etc., for a specified price each, totaling $2,031,911.52, deliveries to be in lots of 5 and to be completed within 24 months from the date of the contract.

Contract dated November 9, 1915, referred to as contract No. 513, by the terms of which plaintiff obligated itself to manufacture 228 torpedoes, etc., for a specified price each, totaling $1,320,314.59, deliveries to be in lots of 5 and to be completed within 24 months from the date of the contract.

Contract dated April 9, 1917, referred to as No. 576, by the terms of which plaintiff obligated itself to manufacture 344 torpedoes, etc., for a specified price each, totaling $2,-112,160, deliveries to be in lots of 12 torpedoes, 6 lots, or 72 torpedoes, to be delivered on or before July 1, 1918, and to continue thereafter at the rate of 6 lots, or 72 torpedoes, per month until completion of the contract.

Contract dated April 9, 1917, referred to as No. 577, by the terms of which plaintiff obligated itself to manufacture 952 torpedoes, etc., for a specified price each, totaling $7,541,744, deliveries in lots of 12 torpedoes, 6 lots, or 72 torpedoes, to be delivered on or before July 1, 1918, and deliveries to continue at the rate of 6 lots, or 72 torpedoes, per month for four months, then at the rate of 12 lots, or 144 torpedoes, per month, until completion, final delivery to be made within 24 months of date of contract.

Contract dated April 16, 1917, referred to as contract No. 597, by the terms of which plaintiff obligated itself to manufacture 876 torpedoes, etc., for a specified price each, totaling $6,939,672, deliveries to be in lots of 12 torpedoes, one lot to be delivered on or before June 1, 1918, and not less than three lots, 36 torpedoes, per month thereafter until completion, final delivery to be within two years from date of contract.

Contract dated January 5, 1918, referred to as contract 1223, by the terms of which plaintiff obligated itself to manu-

facture 1,608 torpedoes at specified prices each, totaling $14,545,968, deliveries to be as follows: 120 torpedoes in July, 1918; 120 torpedoes in August, 1918; and at a specified monthly rate of delivery thereafter until completion.

Contract dated January 7, 1918, referred to as contract No. 1224, by the terms of which plaintiff obligated itself to manufacture 1,000 torpedoes at a specified price each, totaling $6,186,000, deliveries to be in lots of 12 as directed by the Bureau of Ordnance.

The authority of the contracting officers to execute said contracts in behalf of the United States is not questioned in this action.

True copies of all of the foregoing contracts are attached to and made a part of plaintiff's petition marked "Exhibits A, B, C, D, E, F, G, and H," respectively, and are made a part of this finding by reference.

III. The outbreak of the World War in April, 1917, created an abnormal condition with respect to labor and general economic conditions by reason of which it became necessary for the Government to establish an agency to effect a stabilization of wages of labor generally. For that purpose a board known as the Shipbuilding Labor Adjustment Board was created August 20, 1917, composed of three members, one member appointed jointly by the Emergency Fleet Corporation and the Navy Department, one representing the public appointed by the President of the United States, and one representing the labor unions appointed by the president of the American Federation of Labor. This board was established for the purpose of adjusting disputes that might arise concerning wages and working conditions of labor engaged in the construction or repair of shipbuilding plants or of hulls and vessels in private shipyards under contract with the Emergency Fleet Corporation or the Navy Department.

On April 8, 1918, the President by proclamation created the National War Labor Board, the duty of which was to effect settlements of disputes and contentions arising between employers and employees in all branches of industry engaged in the production of ships or war supplies.

IV. On June 18, 1918, the War and Navy Departments acting jointly entered into an agreement with certain employers and employees (not including the plaintiff or its employees) engaged in the manufacture of war supplies in the New York district, the purpose of which was to stabilize and make uniform wages paid employees in similar and like industries engaged in the production of war materials for the United States. This agreement termed "a memorandum of award," was as follows:

34034 June 18, 1918.

Memorandum of award by the War and Navy Departments in the matter of the dispute relative to wages, hours, and conditions of labor for machinists in certain plants engaged in making war supplies for these two departments in Greater New York.

Certain employers engaged on contracts with the War and Navy Departments having requested advice of the contracting officers of the Government in regard to wages that should be paid to meet demands submitted to them in behalf of their employees; and this matter having been investigated and hearings held by the Labor Adjustment Board of Army ordnance;

And having in mind that the Government War Labor Policies Board has entered into negotiations with the representatives of labor and employers to establish standard wage rates throughout the country for the various trades and has by resolution required the War and Navy Departments to make no awards establishing new Government wage standards pending these negotiations:

It is agreed by the War and Navy Departments that this matter be adjusted on the following basis wih those manufacturers whose contractual relations with the respective departments permit either department to exercise authority in connection with the wages, hours, and conditions of labor prevailing in their establishments, and where a dispute between the management and the employees exists:

First. Adjustments will be made in the form of an order to each individual contractor establishing the scale of wages which he is authorized to pay to his employees.

Second. The scale of wages established for and prevailing in the navy yard and ordnance arsenals on the east coast will be used as the standard for such awards.

Third. The award will be made to take effect with first pay period beginning on or after May 12th, 1918, for those contractors working under Army ordnance cost-plus con-

tracts; and for all others on the date of the award for the individual contractor involved, or as may be otherwise agreed in each individual case.

Fourth. In the event that any scale higher than that which is used as the standard for this adjustment be fixed by any proper Government agency with the approval of the War and Navy Departments, these departments will consider and act upon an application for the reconsideration of the awards made as herein provided.

Fifth. Where the manufacturer has an agreement now existing, either verbal or written, with his employees by which all machinists are paid the same rate, such agreement shall be continued and the rate awarded shall be the same as that established for the first-class machinists at the navy yard, Brooklyn. In the same way, when there is but one rate existing by agreement for toolmakers the Navy rates for first-class toolmakers shall be the rates to be awarded.

Sixth. That the awards in no case shall be used to reduce the wages being paid to any individual employee in his present employment.

Seventh. That any dispute which may arise in regard to the application of the rates awarded shall be heard and decided by a committee of three men to be appointed by the Secretary of the Navy and the Secretary of War, one to represent the employees, one to represent the employers, and one an Army or Naval officer, who shall be chairman of the committee.

For the Navy:

LOUIS MCH. HOWE,
Asst. to Asst. Secy. Navy.

On July 23, 1918, this memorandum of award was transmitted to E. W. Bliss Co., plaintiff herein, by the following communication:

WAR DEPARTMENT,
NEW YORK DISTRICT ORDNANCE OFFICE,
PRODUCTION DIVISION, INDUSTRIAL SERVICE SECTION,
New York, July 23, 1918.

E. W. BLISS COMPANY,
Brooklyn, N. Y.

(Attention of Mr. H. Seeman.)

GENTLEMEN: In accordance with telephone conversation of to-day I am sending you a copy of recent wage award made by War and Navy Departments for the New York districts.

As stated to you over the phone, if I can be of any further service to you in this matter I will be glad to come

over and see you or have Capt. Blatchly, who is attached to this office, do so.

By order of the Chief of Ordnance.

Alexander M. Bing,
Industrial Service Section.

V. At the time plaintiff received the memorandum of award it was employing a large number of men manufacturing torpedoes under its contracts with the United States, and there was no evidence of any labor trouble in its organization, nor had the employees of plaintiff made any claims for increase in wages.

Immediately following the transmission of the memorandum of award to plaintiff, Louis McH. Howe, assistant to the Assistant Secretary of the Navy, called the vice president and general manager of the E. W. Bliss Co. by long distance telephone and informed him that he (Howe) was informed that there was to be a strike in the plant of E. W. Bliss Co. in the next couple of days. The vice president informed him that there was nothing to it; that there was no evidence of any strike in their plant; and that there would not be any strike if Mr. Howe and his associates in Washington would keep their hands off. The vice president of the E. W. Bliss Co. also informed Mr. Howe that he personally would guarantee satisfactory production under contracts with the United States, and that it was neither necessary nor desirable to increase the wages of employees at that time.

Thereafter a Mr. McEntee, a labor leader in the International Association of Machinists, and at that time a member of one of the labor boards in the New York district, under appointment from the Navy Department, and other representatives of the Navy Department visited plaintiff's plant and notified the officials of plaintiff's company in reference to the proposed strike and the increase of wages for plaintiff's employees. These representatives were informed by the officials in plaintiff's organization that there was no danger of a strike in plaintiff's plant and that it was unnecessary to increase the wages of plaintiff's employees; also that an increase in wages would result in an increase in plaintiff's cost above that which had been estimated in

the bid submitted, and that the E. W. Bliss Co. could not and would not put into effect any increase in wages until it was assured that it would receive compensation for the increased cost resulting therefrom.

VI. On August 23, 1918, Rear Admiral Ralph Earle, Chief of the Bureau of Ordnance, wrote a letter to plaintiff as follows:

NAVY DEPARTMENT,
BUREAU OF ORDNANCE,
Washington, D. C., August 23, 1918.

Subject: Increased compensation to employees.
Inclosure: (A) Copy of award made on June 18th by the War and Navy Departments in the matter of dispute relative to wages, hours, and conditions of labor for machinists in certain plants engaged in making war supplies for these two departments in Greater New York.
(B) Copy of letter addressed by the Navy Department to Mr. H. J. Slocum, jr., secretary and treasurer of the Metropolitan Metal Manufacturers Association.

SIRS: Following the recent conference between your firm and representative of the Navy Department, and by direction of the Secretary of the Navy, the bureau desires that you make as the basis of your wage scale, the scale approved by the Navy Department in accordance with the general agreement between the employers, employees, and the War and Navy Departments for New York City and vicinity, dated June 18th, a copy of which is forwarded herewith as inclosure (A).

In the event that your firm desires to request remuneration for the additional cost imposed upon you by this award, you will address a letter directly to the Secretary of the Navy requesting an investigation and examination by the Navy cost inspector as to the justness of your claim. Upon a favorable report of this investigation, a supplementary contract may be entered into by the Navy Department with your firm to cover this additional cost.

Respectfully,

(s) RALPH EARLE,
Rear Admiral, U. S. N.,
Chief of Bureau.

E. W. BLISS CO.,
Brooklyn, N. Y.

VII. During the time that intervened between June 18, 1918, and September 10, 1918, numerous letters passed be-

tween the officials of the Navy Department in reference to the increase of wages at plaintiff's plant. Numerous conferences were held between the officials of the Navy Department and the officials of plaintiff's organization, both at New York and at Washington, in reference to the increase of wages at plaintiff's plant, and at all of the conferences plaintiff's officials insisted that there was no necessity for increasing the scale of wages and vigorously protested against the proposed increase on the ground that it was unnecessary. The officials of plaintiff absolutely refused to increase its scale of wages unless they were assured that they would receive additional compensation for the increased cost of production that would be occasioned by the proposed increase. This assurance was given them by the representatives of the Navy Department. Secretary Daniels stated to the officials of plaintiff that their position was right and that the E. W. Bliss Co. could count on reimbursement of the increased cost, and stated that he would appoint a Navy board to determine the increase in cost caused by the Navy orders and would have it covered by an additional contract.

VIII. On August 27, 1918, the Secretary of the Navy sent plaintiff the following telegram:

AUGUST 27, 1918.

The department desires to call your attention to the agreement entered into by the War and Navy Departments with the employers and employees in the district of New York, which includes your plant, in regard to wages for machinists.

This agreement provides that first-class machinists shall receive 73¢ and first-class toolmakers 79¢ per hour. The department desires that you put these rates into effect at your plant.

It is understood that in addition to this decision a 10 per cent increase in other trades will adjust certain labor differences in your works. To this the department is also agreeable.

Definition of who shall be rated as first-class machinists and other adjustments and applications of the New York decision will be handled by the special board appointed by the Army and Navy for that purpose. Mr. Slocum will advise you of the letter sent him by the Navy Department as to the basis on which the Government will increase its

Reporter's Statement of the Case

payment to you under the award. Please post notice of your acceptance of the award immediately in your works to avoid possible labor disturbances. These rates are to begin September 2d.

JOSEPHUS DANIELS.

On September 10, 1918, Rear Admiral Ralph Earle, Chief of the Bureau of Ordnance, wrote plaintiff as follows:

In reply refer to No. 34034 (A2)-O ADW.

NAVY DEPARTMENT,
BUREAU OF ORDNANCE,
Washington, D. C., Sept. 10, 1918.

Subject: Labor settlements in New York district.
Inclosure: (A) Copy of memorandum of award, etc., June 18, 1918. (B) Memorandum of agreed application, etc., June 18, 1918.

GENTLEMEN: You are informed that on June 18th the Navy Department, in conjunction with the War Department, made an award covering labor wages and conditions for the New York district for all manufacturers engaged on war contracts. Inclosure (A) is a copy of this award. The New York district comprises Greater New York, with its suburbs and adjoining towns.

You are now engaged on war work under the following contracts with the Navy Department:

No.	Date	Material
497	May 4, 1915	288 Mark VIII, Mod. 2, torpedoes.
498	May 17, 1915	140 Mark VII, Mod. 4, torpedoes.
500	May 3, 1915	120 Mark VII, Mod. 3, torpedoes.
510	Nov. 9, 1915	240 Mark VIII, Mod. 2, torpedoes.
513	Nov. 9, 1915	228 Mark VII, Mod. 4, torpedoes.
576	Apr. 9, 1917	344 Mark X torpedoes.
577	Apr. 9, 1917	952 Mark VIII, Mod. 3, torpedoes.
597	Apr. 16, 1917	876 Mark VIII, Mod. 3, torpedoes.
1224	Jan. 7, 1918	950 Mark VII, Mod. 4 and 50 type.
1223	Jan. 5, 1918	1,608 Mark VIII, Mod. 3, torpedoes.
1283	Feb. 4, 1918	85 Mark VIII-I and 20 Mark IX.

The department desires that you adjust your wages and conditions to conform to the award of June 18, 1918, as set forth in the inclosure (B).

Should you desire to make claim for additional remuneration because of the increase in wages, you will write a letter to the Secretary of the Navy asking for this as an extra. The department will then send an accountant to go over the books and records, and if in the original bid no allow-

ance has been made for any proposed increase of wages an extra will be allowed contracts for the additional wages imposed by the New York award.

Very truly yours,

Ralph Earle,
Rear Admiral, U. S. Navy,
Chief of Bureau.

The E. W. Bliss Company,
17 Adams Street, Brooklyn, N. Y.

"Inclosure B

"34034. Memorandum of agreed application of settlement of machinists' wages under the general settlement effected by the War and Navy Departments for the district of NewYork of June 18, 1918.

"By a mutual agreement between representatives of the Army and Navy, the E. W. Bliss Co., and officials of district No. 15, International Association of Machinists, it is agreed that the following adjustment of wages shall immediately go into effect as of the date September 2, 1918, in the ordnance plant of the E. W. Bliss Company, Brooklyn:

"All toolmakers now receiving 65 cents per hour shall receive the rate agreed upon in the adjustment of June 18th, 1918, previously made by the War and Navy Departments for the district of New York.

"All machinists employed in the ordnance plant of the E. W. Bliss Company and receiving on September 1, 1918, 56¼ cents per hour or more are to receive 73 cents per hour.

"All men employed on machine work receiving less than 56¼ cents per hour on September 1, 1918, are to receive an increase of 10 per cent on their earned rate.

"It is the understanding by all parties that it is the intention to adjust individual instances in the case of men receiving less than 56¼ cents per hour as speedily as proper regulations and the definitions can be worked out, and the Navy Department agrees that if it is legally possible such further adjustments will be made as of date of September 2, 1918."

IX. Upon receipt of the letter dated September 10, 1918, plaintiff decided to accept the orders of the Navy and to put into effect in its plant the schedule of wages provided for in the award of June 18, 1918, and posted in its shops the following notice to its employees:

"NOTICE

"*To our employees:*

"After negotiating with the Navy Department relative to the increased scale of wages which they desire us to put into effect in our plant, we have received from them a request to post in our shop a notice to the effect that we accept their proposition to increase the wages on a basis to be definitely decided upon by a special board appointed by the Army and Navy for that purpose.

"We therefore give notice to our employees that this new scale will be determined at as early a date as possible, but will be effective from September 2nd, 1918.

"E. W. BLISS COMPANY."

X. Immediately following the posting of the notice to the employees of the plaintiff company, as set out in Finding IX hereof, arrangements were made with the Navy Department whereby the department sent a Mr. Thayer, master mechanic of the Boston Navy Yard, with assistants to plaintiff's plant. These representatives went through the shops and orally interviewed every employee as to his experience and qualifications and had each employee fill out a questionnaire or qualification sheet showing his qualifications and experience. On the basis of this examination and questionnaire they rated the employees as first, second, and third-class mechanics, machinists, etc. Representatives of plaintiff company had no part in or control of this examination and rerating of its employees. Plaintiff in all respects complied with and lived up to all the terms and conditions of the Navy Department's orders, and on October 31, 1918, the vice president of plaintiff company addressed and sent a communication to the Chief of the Bureau of Ordnance wherein plaintiff applied for increased compensation and asked advice as to how and in what manner it could be reimbursed the amounts expended by it for the increased labor cost resulting from the orders of the Navy Department.

XI. On December 14, 1918, the Secretary of the Navy appointed a board of three naval officers, consisting of N. E. Mason, United States Navy, retired, Bureau of Ordnance; J. N. Jordan, Bureau of Supplies and Accounts; Lieut. G. H. Johnson, Bureau of Ordnance, and instructed said board

to "consider and determine the increased compensation, if any, due the E. W. Bliss Co., under contracts Ordnance Nos. 500, 510, 513, 576, 577, 597, and department Nos. 1223, 1224, and 1235 [1283] for torpedoes by reason of the increased wages paid employees at the contractor's plant under orders issued by the Navy Department." The board was informed that under instructions from the department Lieutenant Brick and Lieutenant Main, accounting officers on duty in the Bureau of Supplies and Accounts, were making an investigation to determine the increased costs, if any, involved by reason of having put into effect the wage scale authorized by the department, and that the report of these accounting officers when completed would be furnished the board for its information.

On December 16, 1918, Rear Admiral Ralph Earle, Chief of the Bureau of Ordnance, wrote plaintiff as follows:

NAVY DEPARTMENT, BUREAU OF ORDNANCE,
Washington, D. C., Dec. 16, 1918.

Inclosure: (A) Letter from Assistant Secretary of Navy to Mr. H. J. Slocum, jr., Metropolitan Metal Manufacturers' Association; (B) Schedules (A), (B), (C), and (D) of company's proposed increased wages to machinists.

GENTLEMEN: Shortly prior to September 2 your representatives met with the Navy Department and the officials of district No. 15, International Association of Machinists, and entered into a wage agreement increasing rates of pay for men employed in the machine industry in your plant. The Navy Department advises that this meeting was held at its request after an investigation by its agents of the labor conditions in your plant, which led to the belief that unless such action was taken your production of torpedoes would entirely cease, and therefore it was to the interests of the Government and the necessity of war to direct that such increases should be made. This agreement left open the question of adjustment of rates to machinists other than first-class, and in accordance with the spirit of this agreement and the approval of all parties concerned the Assistant Secretary of the Navy sent Master Mechanic Thayer with several assistants to visit your plant and examine such of your machinists who were receiving less than seventy-three cents per hour.

This agreement of September 2d was part of the general New York agreement of June 16, 1918, and the spirit of both awards was to standardize wages in the New York dis-

trict in accordance with navy-yard rates then established for machinists. As a result of Mr. Thayer's examination, and to carry out the intent of the Navy Department in the agreement, the bureau has prepared inclosure (B), which consists of schedules (A), (B), (C), (D).

(a) Schedule (A) is a list of men in your employ who upon examination qualified as 2d-class machinists but who are receiving less than seventy-three cents per hour. The Navy Department requests that you increase the pay of these men to seventy-three cents per hour, making said increase retroactive to September 2, 1918.

(b) Schedule (B) is a list of men in your employ who upon examination qualified as 2d-class machinists but who are receiving less than sixty-seven cents per hour. The Navy Department requests that you increase the pay of these men, beginning with your next pay roll, to sixty-seven cents per hour.

(c) Schedule (C) is a list of men in your employ who upon examination qualified as 3d-class machinists but who are receiving less than sixty-one cents per hour.

The Navy Department requests that you increase the pay of these men, beginning with your next pay roll, to sixty-one cents per hour.

(d) Schedule (D) is a list of men in your employ who upon examination qualified as 1st, 2d, or 3d class machinists as shown, respectively, but who are now receiving more than the established rates for their respective class. The New York agreement of June 16th states that such men while in their present employ be not reduced. Should they leave, however, their reemployment should not be made at rates higher than those established for their respective class.

Relative to reimbursement upon your contracts for additional labor costs by the above, the bureau refers you to inclosure (A), which states fully the methods to be pursued and steps taken relative to same.

Very truly yours,

RALPH EARLE,
Rear Admiral, U. S. N., Chief of Bureau.

E. W. BLISS COMPANY,
Brooklyn, N. Y.

Inclosure A to said letter is the letter of August 6, 1918, written by Louis McH. Howe, assistant to Assistant Secretary of the Navy, to H. J. Slocum, jr., secretary and treasurer of the Metropolitan Metal Manufacturers' Association of New York City, outlining the position of the Navy Department in reference to the increase of wages in the New York

district. Inclosure B in said letter consists of schedules (A) first-class machinists; (B) second-class machinists; (C) third-class machinists; and (D) miscellaneous.

XII. The members of the board appointed to consider the changes under contracts with the E. W. Bliss Co. for torpedoes and to determine the increased compensation, if any, due E. W. Bliss Co. personally visited plaintiff's plant, investigated conditions, interviewed representatives of plaintiff company, including its comptroller, with respect to the question of the excess cost caused by reason of the increased wages ordered by the Navy Department, and secured all information deemed necessary by said board to make its findings and report; and on July 14, 1919, the board submitted its report to the Secretary of the Navy through the Bureau of Ordnance, the material portions of which report are as follows:

"2. After due consideration of the information and claims submitted by E. W. Bliss Company the board finds that the increases in wage schedules promulgated by the company in compliance with the direction contained in references (m), (n), and (q) have resulted in an increased cost to the contractor under contracts Nos. 500, 510, 513, 577, 597, 1223, and 1224 of approximately $150 for each torpedo contracted for.

"3. While increases in the pay roll effective on the date of the increase in the wage schedules were approximately 11.5 per cent of the pay roll and amounted to approximately $9,000 per week, the average increase over a period of twenty-five weeks was $6,716.60 per week, a total increase of $151,181.85, during which period 951 torpedoes were constructed.

"5. The estimated cost of construction under the above contracts is approximately $35,000,000, and the estimated profit shown above is but 2.5 per cent of costs.

"6. The board recommends that the contract price for the 4,768 torpedoes manufactured or to be manufactured under the above contracts be increased by the amount of $150 per torpedo under each contract, being the approximate amount of increased labor cost. The approval of this recommendation will result in an additional profit of $715,200.00 to the E. W. Bliss Company, which will increase their rate of profit on the entire order to approximately 4.5 per cent on costs, which profit is considered to be of minimum equity to the contractor."

The report of the board was approved by Ralph Earle, Rear Admiral, United States Navy, Chief of the Bureau of Ordnance, and forwarded to the Secretary of the Navy on July 22, 1919.

No part of the sum recommended by the board has been paid to plaintiff.

XIII. The several contracts under which torpedoes were furnished by plaintiff were completed at different times and payments were made at the prices specified therein. At the time each contract was completed, and payment made, with the exception of No. 1223, the same being the last contract to be completed, plaintiff was requested to execute, and did execute, a form of release submitted to it by the Navy Department as required by the second paragraph of the eighteenth section of each contract, copies of which releases are attached to and made a part of plaintiff's amended petition and marked "Exhibits I, J, K, L, M, N, and P." The release under contract No. 1223 is made a part of plaintiff's amended petition, and marked "Exhibit O." Each of the exhibits attached to the amended petition is made a part of this finding by reference.

XIV. At the time the contracts were in the course of completion, and at the time payments for the torpedoes delivered thereunder were made and the releases executed, negotiations were pending looking to the payment of the excess cost incurred by plaintiff by reason of the increase in wages.

Both before and subsequent to the time the releases were executed many letters passed between the representatives of plaintiff and Government representatives in reference to the payment of the amount of the excess cost incurred by plaintiff by reason of the increase in wages as determined by the board appointed to consider the same. It was at all times contended by plaintiff's representatives that the plaintiff was entitled to the amount of extra cost incurred by the increased wages. At no time did the Navy Department question the justness of plaintiff's claim. The only objection made to the payment of the same was that the Comptroller of the Treasury had held that compensation under

the fixed-price contract could not be increased unless for a valuable consideration moving to the United States, and that under the comptroller's decision there was no authority to pay the claim.

It was not until the release was executed under contract No. 1223 for 1,608 torpedoes, the same being the last contract to be completed, that the question of inserting a qualifying clause in the release to the effect that payment of the money due under the contract at the specified price mentioned therein would not include the increased compensation promised by the Secretary of the Navy and recommended by the board appointed to consider the changes under the contracts, and to determine the increased compensation, if any, was considered by the Government representatives.

The question as to the advisability of a qualified release was first suggested to Admiral McVey of the Navy Department and he consulted with a Mr. Walker of the Judge Advocate General's office, who advised that a qualifying clause be inserted in the release under contract No. 1223. At that time all of the other releases had been executed and delivered and there was no opportunity to insert a qualifying clause in any of them. Following the suggestion of the Judge Advocate General's office, the Navy Department prepared a release under contract No. 1223 and forwarded it to the plaintiff for signature. It was in the same form and tenor as the releases executed under the other contracts except that it contained the following clause:

"*Provided*, That this release shall not be taken to include claims arising under the said contract other than those which the Secretary of the Navy had jurisdiction to entertain."

XV. During the times that the Government was making payments to plaintiff of the amounts fixed by the several formal contracts the claim for increased wages was treated as a separate item by both the representatives of the Government and the representatives of plaintiff corporation. The Navy Department was, during all that time, seeking authority to settle plaintiff's claim for increased wages either through the Comptroller of the Treasury, or his suc-

cessor, the Comptroller General, or by direct congressional appropriation.

It was never the understanding of the parties that payment made to plaintiff for the torpedoes delivered at the specified contract price included all that was due plaintiff under the contract.

The Government representatives had no intention of exacting or obtaining any release of the wage claims from plaintiff. At the time the several releases were executed it was the intention of both parties that the releases cover the amount due under the several contracts at the specified prices mentioned therein. Neither the Government representatives nor plaintiff's representatives ever intended that any of the releases cover plaintiff's wage claims or that the plaintiff should be precluded from thereafter asserting the same.

XVI. A few torpedoes had been completed prior to September 2, 1918, when the increase in wages took effect, and many other torpedoes were in various stages of completion on that date. One torpedo contract (No. 1283, for 105 torpedoes), not mentioned in the board's report, had likewise been partially completed before September 2, 1918, and these torpedoes were completed thereafter. The board in reaching its conclusions took into consideration the status of the work on September 2, 1918, and taking into account such status, and omitting contract No. 1283 from a share in excess costs, the board found that an allowance of $150 per torpedo for all the torpedoes covered by the several contracts completed, except No. 1283, was the equivalent of the increased labor costs of $158.97 per torpedo on work done on torpedoes after September 2, 1918. The payment recommended by the board, $715,200, represented the board's conclusion that such amount was the increased cost of labor incurred on torpedoes after September 2, 1918, under orders of the Secretary of the Navy, which sum did not increase the percentage of profit that the plaintiff would have received had no increase in labor costs occurred.

The court decided that plaintiff was entitled to recover $715,200.

Opinion of the Court

BOOTH, *Chief Justice*, delivered the opinion of the court:

This case was before this court in 1926. Plaintiff's petition was dismissed (61 C. Cls. 777). The Supreme Court on December 12, 1927 (275 U. S. 509, 510), reversed our judgment and remanded the case under the following order:

"This court is of opinion that the Secretary of the Navy had authority to make further contracts to pay the petitioner the increased cost resulting from the wage increases put into effect at the Secretary's instance, in the course of the petitioner's performance of the original contracts, and that the findings of the Court of Claims show that such further contracts were made and were based upon an adequate consideration, consisting of both advantage to the Government and detriment to the petitioner. The findings on other points are not such as to enable this court finally to dispose of the case. Accordingly the judgment of the Court of Claims is reversed and the cause is remanded to that court with directions (1) to make further findings (a) as to whether the instruments of release express the actual intention of the parties in respect of a settlement or release of the petitioner's claim for increased cost resulting from putting into effect the increased wages, or whether through mutual mistake, duress, or other sufficient ground for reformation the instruments of release were so drawn and signed that they failed to express the actual intention of the parties in that respect, and (b) as to what amount of increased cost to the petitioner resulted from the wage increases as respects work done under the original contracts after the wage increases took effect; (2) to make these findings from the evidence already taken and any additional evidence which the Court of Claims may deem it proper to receive; (3) to allow any amendments of the pleadings which may be needed to present the question whether the instruments of release should be reformed to express the actual intention of the parties in the particular herein named; and (4) to render such judgment in the cause as may be appropriate in view of the amended pleadings and the supplemented findings.

"The mandate herein shall issue forthwith."

Subparagraph (a) of the foregoing order of remand is the one now in issue.

The plaintiff, a West Virginia corporation, during the years 1915, 1917, and 1918 entered into eight written contracts to manufacture and deliver to the Government a specified number of torpedoes. The contracts were per-

Opinion of the Court

formed by the plaintiff to the satisfaction of the Government, and this litigation involves seven releases executed by the plaintiff at the time final payments were made by the Government of the consideration expressed in the contracts. The contracts exacted the execution of final releases of all claims arising under the contracts before final payment would be made. While the plaintiff was engaged in performing the contracts an acute situation with reference to the wages and working conditions of mechanics and laborers engaged in Governnment work arose, due to war conditions. The War and Navy Departments adopted a policy designed to stabilize wages and remove all causes for discontent and deal justly with laborers and mechanics, either in the employment of Government contractors or directly with the departments. Not only the urgent necessities of the times but the inclination of the officials themselves required a course of action to meet the abnormal economic conditions then prevailing. The adopted policy, hereafter discussed somewhat in detail, embraced a programme of uniformity and provided a stabilized wage scale applicable in its provisions to both skilled and unskilled labor. Wages were increased, and through investigations made by appointed boards were put into effect to the extent of reaching Government contractors generally. The plaintiff, notwithstanding its protest against the adoption of the advanced wage scales, was required to put them into effect, did so, paid the higher wages, has received an admitted award from a duly constituted board of the department of $715,-200, and it is not disputed that under the decisions of the Supreme Court in this case a contract to pay the same arose, is valid, and that the amount awarded is correct.

The sole defense to the suit is predicated upon the conclusive and binding effect of seven of the eight releases executed by the plaintiff when it received the final payments of the stipulated contract price. One clause in each of the contracts involved provides as follows:

"* * * that from the last payment or payments becoming due thereunder there shall be reserved the sum of not less than five thousand dollars ($5,000.00), to be paid after the acceptance of the last lot of material and upon

Opinion of the Court

the execution by the party of the first part of a release to the United States, in such tenor and form as shall be approved by the Secretary of the Navy of claims against the party of the second part arising under or by virtue of said contract * * *."

The seven releases relied upon, executed upon different dates, were in part as follows:

"*Now, therefore*, in consideration of the premises and of the sum of six thousand five hundred three and 51/100 dollars ($6,503.51) lawful money of the United States, the amount of the final payment due under said contract, being to it in hand paid by the United States, represented by the Chief of the Bureau of Ordnance, the receipt whereof is hereby acknowledged, the E. W. Bliss Company does hereby, for itself, its successors and assigns and legal representatives, remise, release, and forever discharge the United States of and from all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law and in equity, for or by reason of or on account of the manufacture and delivery of torpedoes, appurtenances, and spare parts under the contract aforesaid, and does hereby further guarantee to fulfill and comply in all respects with the requirements of paragraph numbered seventy-nine (79) of the specifications annexed to and forming part of said contract."

The eighth release, given under contract #1223, contained, in addition to the above provisions, the following proviso:

"*Provided*, That this release shall not be taken to include claims arising under the said contract other than those which the Secretary of the Navy has jurisdiction to entertain."

The plaintiff seeks a reformation of the seven releases, predicating its contention upon a mutual understanding and intent of the parties that at the time of their execution the parties did not contemplate or intend them to embrace a settlement of the plaintiff's claim for extra wages paid its laborers under the department's orders and contract; that through mutual mistake, as now worded, they do not express their designed and intended purpose, which was to limit the releases to simply a conclusive settlement of all sums, claims, etc., due or which might arise under the express terms of the contracts. It is evident from this as well as other cases of a similar character that the Navy

Department in formulating and adopting its policy of increased wages to laborers, whereby an additional expense was imposed upon contractors, had neither the authority, power, nor inclination to do so without reimbursement to contractors where reimbursement was due. (*Electric Boat Co.* v. *United States*, 66 C. Cls. 333.) To first establish a policy, then a uniform wage scale, and finally to put the scale into effect involved a series of investigations, conferences, and deliberations of extreme importance and care. It was a distinct subject-matter of very great public and private importance. As the record herein indisputably attests, the department succeeded with promptness and satisfaction in establishing its general policy and its precise scale of wages to be paid, but encountered obstacles in the way of paying reimbursement to contractors with whom it had an agreement to reimburse, which were not finally removed until the decision of the Supreme Court in this very case.

The first agency established to effect the stabilization of wages of laborers generally was the shipbuilding labor adjustment board created August 20, 1917. On April 8, 1918, the President by proclamation created the National War Labor Board. On June 18, 1918, the War and Navy Departments entered into an agreement with certain employers and employees then engaged in supplying war material and supplies to the Government, by the terms of which harmonious wage scales were to be brought about and awards made to effect the same. The plaintiff, while not a party to the above agreement, received notice of the above memorandum award. The plaintiff at this time was experiencing no labor troubles on account of wages, no strike was imminent, and none anticipated. Shortly thereafter, however, on August 23, 1918, the plaintiff was advised that it was to put into effect the wage scale approved by the department and present its claim for increased cost of performance. The plaintiff protested against the application of the foregoing order to its plant, pointed out to the department in various written communications and conferences the lack of necessity for adopting the increased wage scale, and finally asserted that, if compelled to adopt it, would assuredly expect reimbursement for the increased

cost of production incurred. The plaintiff was expressly assured by the department that reimbursement would be made, dependent as to amount upon investigation to be made by a board to be appointed by the Secretary of the Navy. On August 27, 1918, the plaintiff received from the Secretary of the Navy a written request to put into effect in its plant the increased wage scale adopted in accord with the terms of the memorandum award of June 18, 1918, to become effective on September 2, 1918, and the above notice was supplemented by another on September 10, 1918, from the Chief of the Bureau of Ordnance, not only specifying in detail the plaintiff's contracts with the department, and urging the plaintiff to put into effect the advance wage scale of the board, but enclosing a separate written agreement for the plaintiff's acceptance, providing for the adoption of the department's agreed-upon wage scale, in which a stipulation was inserted that the "Navy Department agrees that if it is legally possible such further adjustments will be made as of date of September 2, 1918." The plaintiff accepted the terms of the order and agreement of September 10, 1918, and thereafter complied therewith, advancing the wages of its employees in accord with its terms, effective as of September 2, 1918. The department observed its agreement to investigate plaintiff's plant and report upon what, if any, extra cost should be awarded it because of the advance in wages. A personal representative of the department visited its plant, interviewed its workmen and mechanics, and in virtue of interviews and questionnaires classified its employees to correspond to the board's classification for wage increases. The plaintiff was not allowed to and did not participate in this proceeding.

On October 31, 1918, the plaintiff applied to the department for increased compensation and inquired the method of presenting its claim. On December 14, 1918, the Secretary of the Navy appointed a board of three naval officers to consider and pass upon the plaintiff's claim for increased costs of performance, and this board on July 14, 1919 (Finding XII), recommended that the contractual price of each torpedo to be manufactured under existing contracts be

increased to $150, resulting in an award to plaintiff of $715,200. The report of the board was approved by Ralph Earle, Rear Admiral, U. S. N., Chief of the Bureau of Ordnance, and forwarded to the Secretary of the Navy July 22, 1919. The plaintiff made repeated attempts to procure the payment of the award, but without success. The Comptroller General rendered an opinion that under the law the consideration for the performance of the contracts, expressed therein, could not be increased by supplementary contracts to pay the same; that contracts of this nature were without consideration and void, and payment of reimbursement was thereafter withheld by the department pending the settlement of this issue. Thus the controversy continued until the institution of this suit.

From the record it seems certain that both the contractors and the officials of the department in direct contact and charge of plaintiff's claims and relationships with the same treated the question of the payment to the plaintiff of the amount of the board's award in precisely the same way and manner as any other solitary and single claim would have been treated.

The course of proceedings narrated above in detail clearly demonstrates that what was pending was the right to pay an allowed award, one arising in due course of administration, and attributable to the war conditions. Settlement of this claim was *in fieri;* the facts had been found, the award made, but payment was suspended awaiting decision of the courts. Under these circumstances there existed no reason for exacting a release or receipt from the plaintiff with respect to the claim. The department could not pay it, and the plaintiff's only remedy was to resort to the courts. No room for a compromise prevailed, and in so far as the department was concerned, its resources had been exhausted and proceedings ended. The releases relied upon as including settlement of this claim were executed on various dates between June 6, 1919, and July 19, 1922, an extended period of over three years.

The eight torpedo contracts involved a total expenditure of thirty-five million dollars. Each contract by its express

Opinion of the Court

stipulations created mutual rights and obligations giving rise to claims both for and against the contracting parties, in some instances increasing the consideration for performance and in others diminishing it. The Government retained percentages from partial payments; possessed the right to impose liquidated damages for delay and might, for stipulated causes, cancel the contracts and impose liability upon the contractor for alleged nonperformance. Penalties were to be imposed upon the contractor for failure to observe certain obligations; the Government was to be held immune from infringement of patents, and without going further into detail it is sufficient to observe that thirteen paragraphs of the contract provisions are clearly susceptible to controversy, giving rise to claims and subject to many settlements before final installment of the provided consideration was to be paid. In contracts of such magnitude and importance the Government very wisely exacted final releases in order to irrevocably conclude proceedings thereunder. This, we think, was the precise limitation of the legal effect of the releases. The words all "claims and demands whatsoever, in law and in equity, for or by reason of or on account of said contract and supplemental agreement thereto dated December 13, 1920," indicate the settled purpose and intent of the parties in executing them. The contracts and payments due under their terms were the independent transactions under consideration. The subject matter of additional compensation for advanced wage scales was not before the parties at the time, and formed no part of the negotiations leading to a final discharge of the Government under the written contracts to manufacture torpedoes. The Government could not have paid the wage-scale award at the time of the execution of the releases if so disposed, for the Comptroller General's opinion prevented it, and assuredly there can be no presumption that the plaintiff in securing payments legally due in accord with the express terms of its contracts was also intending to release an obligation to reimburse it for an admitted outlay, in addition to its contractual consideration, of over seven hundred thousand dollars. The express terms and provisions of the releases exclude this claim from their scope and

effect. The subject matter of this suit is not the direct result of or arising under or from the contracts mentioned. The contracts were in existence when the crisis arose. The Government might have lawfully exacted performance of them according to their terms. *Charles Nelson Co.* v. *United States*, 56 C. Cls. 448; *Willard, Sutherland & Co.* v. *United States*, 56 C. Cls. 413. The plaintiff was willing to go forward, exacted no increases, and so asserted, but the Government, in pursuance of a national policy, adopted a universal method of procedure to stabilize wages and do justice to laborers because of war conditions. To discriminate between contractors and allow one rate of wages to prevail in one plant and another rate in a different plant performing similar work would, of course, have thwarted the very purpose to secure uniformity and peaceable labor conditions. This condition and the accompanying remedy proposed were not the result of contracts; it is attributable to the war, and, of course, required an independent course of action predicated upon an independent investigation and course of procedure. The adopted policy applied to all transactions involving the employment of labor, whether under contract or otherwise. The Government's necessities gave rise to the transaction, and made it applicable to existing contracts as well as all other war conditions. With this situation confronting the parties the proof is decidedly overwhelming that the parties to the releases relied upon did not intend to foreclose the plaintiff from asserting its claim to the wage board award. The officers of the department in direct charge of the contract settlements on their merits without exception so testify, and the record corroborates their testimony. One release, #1223, contained a reservation of the right to sue. It was prepared by the Navy Department, the reservation inserted by the department upon the suggestion and advice of the Judge Advocate General's office and not intended to be limited to this one release. At the time the plaintiff signed release #1223 the other releases had been executed, and the fact that neither party intended the releases to cover this subject matter is demonstrated by the fact that a release was exe-

cuted by the same parties two days later and the reservation omitted. No witness in the record has ever contended that the plaintiff's attention was directed to the necessity of such a reservation, except in #1223, or that the subject matter of this suit was discussed at the time of the execution of the releases.

The defendant makes no serious defense as to liability under release #1223, and the reason for excepting release #1223 and awarding judgment under a pro rata basis is not apparent when the wage scale applied generally to the performance of all the contracts involved and the amount of the award is conceded to be correct. In the case of *Fire Insurance Association* v. *Wickham*, 141 U. S. 564, 580, 581, the Supreme Court said:

"Aside from this, however, the circumstances attending the execution of a receipt in full of all demands may be given in evidence to show that by mistake it was made to express more than intended, and that the creditor had in fact claims that were not included. Thus in *Simons* v. *Johnson*, 3 B. & Ad. 175, which was an action of covenant, defendant pleaded a release, which recited that various disputes were existing, between the parties, and that actions had been brought against each other which were still pending, but that it had been agreed between them that, in order to put an end thereto, the defendant should pay the plaintiff £150, and that each should release the other from all actions, causes of action and claims brought by him, or which he had against the other, and the instrument then proceeded to release 'all claims, demands, actions whatsoever.' It was held that parol evidence was admissible to show that the claim upon the covenant was not intended to be included in the release, Littledale, J., saying: 'There can be no doubt that the matter contemplated in this release was the actions there referred to, and parol evidence was admissible to show that the subject matter of the present action was not involved in them.'"

Gem Hammock Co. v. *United States*, 60 C. Cls. 262. In the case of *United States Cartridge Co.* v. *United States*, 62 C. Cls. 214, 230, 231, this court held, in a situation similar to the present case, as follows:

"There is only one other question presented with reference to this item and that is predicated on the fact that

Opinion of the Court

upon two items of an entirely different nature the plaintiff had filed a claim with the Boston District Claims Board which had finally been allowed in the sum of $6,577.44, of which allowance the plaintiff was informed, and upon payment of which it was required to sign a release. These two items were the only items involved in that claim, but in the preparation of a release to be signed a form was used which contained a general release of all claims under the contract. At this time the claim for additional labor costs already referred to was pending before another board and was being vigorously prosecuted, and there was no conception apparently upon the part of anyone having to do with these transactions that the two claims had any relation to each other or that the execution of the release in connection with the claim allowed for $6,577.44 in any manner affected the rights of the plaintiff as to its claim for increased labor cost. It is so apparent that this release then signed was not intended to have any effect upon the pending claim for increased labor costs that there could be no justification for giving it any such application at this time."

This court may reform a contract. *Ackerlind* v. *United States*, 240 U. S. 531. The case of *United States* v. *William Cramp & Sons*, 206 U. S. 118, is not, we think, applicable. In the *Cramp case* the suit was to recover for delays attributable to the Government in the way of failure of the Government to deliver to the plaintiff armor plate in the order and at the times needed to complete the work, an obligation the Government assumed in the contract and did not perform. When the time for settlement arrived a complete and conclusive release executed in conformity with the provisions of the contract obviously precluded the plaintiff from recovering for a breach of the contract. What we have said as to independency of the two transactions involved herein expresses our view. In the *Cramp case* (*supra*) the settlement involved the contract and it alone.

Judgment for plaintiff for $715,200. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

Reporter's Statement of the Case

WISCONSIN CENTRAL RAILWAY CO. v. THE UNITED STATES [1]

[No. J-20. Decided June 2, 1930]

On the Proofs

Excise taxes; carrying on or doing business; sec. 1000 (a) (1), revenue act of 1918.—(1) The capital-stock tax imposed by section 1000 (a) (1) of the revenue act of 1918 is an excise laid upon the privilege of doing business in a corporate capacity.

(2) The amount of business transacted by a corporation alone is not determinative of whether or not such corporation is "carrying on or doing business."

(3) Where a business can not be carried on without two corporations taking part in it, they are each liable for the tax.

The Reporter's statement of the case:

Mr. John L. Erdall for the plaintiff. *Mr. George F. Snyder* was on the briefs.

Mr. Lyndon H. Baylies, with whom was *Mr. Assistant Attorney General Herman J. Galloway*; for the defendant. *Messrs. McClure Kelley* and *C. M. Charest* were on the brief.

The court made special findings of fact, as follows:

I. The plaintiff was duly organized as a corporation for the sole purpose of maintaining and operating a railroad which had already been constructed for public use in the conveyance of persons and property, pursuant to section 1820 of the Revised Statutes of Wisconsin, 1878, chapter 87.

II. Section 1828 of chapter 87, and section 1748 of chapter 85 of the Revised Statutes of Wisconsin conferred upon the plaintiff the powers which are ordinarily granted to railroad companies.

III. On or about the first day of April, 1909, the plaintiff duly executed and delivered to the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, hereinafter called "Soo company," an instrument letting and demising all of its property of every character to the Soo company for a

[1] Certiorari applied for.

period of ninety-nine (99) years, which it was authorized to do by the laws of Wisconsin. A copy of said lease is made Appendix A to these findings and is made a part hereof by reference.

IV. Previous to the execution and delivery of the lease the Soo company purchased outright 50½ per cent of all of the common stock and acquired control of more than ninety per cent (90%) of all of the preferred stock of the plaintiff. Complete control of the preferred stock (except the right to sell it) was acquired through a preferred stock exchange agreement made between the Soo company and the owners of the preferred stock. At or about the time the lease was delivered the Soo company elected a majority of the board of directors of the plaintiff. Certain officers of the plaintiff resigned, and their places were filled by officers of the Soo company. The remaining members of the plaintiff's staff were made officers and employees of the Soo company. The general offices of the plaintiff at Chicago were abolished and all the records of the plaintiff were removed to the general offices of the Soo company at Minneapolis, Minnesota.

V. Immediately after the execution and delivery of the lease the Soo company as lessee took exclusive possession of all of the property of the plaintiff. It published and issued to all officers and employees of the plaintiff and to all concerned a notice stating that the Soo company had leased the Wisconsin Central Railway and would thereafter operate the same as a part of its system to be known as the Chicago division, that all persons then holding positions with the Wisconsin Central Railway would thereafter be subject to the authority and control of the Soo company and its officers; notices were published to the effect that the Soo company would thereafter transact in respect to the Chicago division all business relating to freight and passenger traffic. About the same time the Soo company published and issued a notice addressed to agents and foreign roads stating that the Wisconsin Central Railway had by lease passed under the control of the Soo company, and that all correspondence relating to overcharges or loss and damage claims growing out of business transacted on the Chicago division should be

addressed to the freight claim agent of the Soo company. The Soo company also published and issued its notice addressed to foreign lines, stating that the properties of the Wisconsin Central had been leased to the Soo company, and that thereafter settlements should be made with the Soo company.

VI. These circulars were carried out in all respects. The Soo company took possession and control of all of the property of the plaintiff and has ever since operated its railroad lines as the Chicago division without any direction or supervision by Wisconsin Central officials or Wisconsin Central directors. All bills of lading and agreements with shippers for handling freight on the Chicago division have been made in the name of the Soo company. All tickets and baggage checks for the transportation of baggage and passengers on the Chicago division have been made in the name of the Soo company. All tariffs covering business to be transacted on the Chicago division have been made and filed in the name of the Soo company. All reports required to be made by public authorities in connection with business of the Chicago division have been made in the name of the Soo company. The Wisconsin Central, when required to report has reported as a nonoperating company. All litigation growing out of the operation and management of the Chicago division has been handled by and in the name of the Soo company. The Soo company has conducted all accounting in connection with the Chicago division. The freight terminals at St. Paul and Minneapolis owned and previously used by the Wisconsin Central were sold by the officers of the Soo company, corporate officers of the Wisconsin Central, executing the deed. The Soo company organized a corporation called the Central Terminal Railway Company, which acquired in Chicago, property on which freight terminals were constructed. Bonds were issued by the Central Terminal Railway Company, secured by a mortgage on its property, the Soo company executing all such bonds jointly with the Central Terminal Railway Company, thereby assuming responsibility for the payment of both principal and interest thereon. These freight terminals cost approxi-

mately $8,000,000. When the lease was delivered, the Wisconsin Central had the right to use the passenger station of the Illinois Central and certain freight terminal and trackage in Chicago. The arrangement with the Illinois Central was terminated. The Soo company then negotiated with the Baltimore & Ohio Railway Company for the use of its passenger terminals in Chicago, and for certain trackage rights. The right to use the passenger station and certain tracks of the Baltimore & Ohio was acquired in a ninety-nine (99) year lease from the Baltimore & Ohio to the Soo company, terminating at the same time that the lease from the Wisconsin Central to the Soo company expires. The Soo company has no line into Chicago except over the Chicago division.

VII. The corporate organization of the Wisconsin Central has been kept up; each year a meeting of its stockholders has been held in Milwaukee, Wisconsin, as required by the Wisconsin law. Each year a representative of the Soo company, being the owner of the majority of the common stock and having the right to vote nearly all of the preferred stock, has attended the meetings at Milwaukee and nominated and voted for the directors. Certain corporate officers have been elected annually. The president of the Soo company has been elected president of the plaintiff. As a rule the vice president of the Soo company has been elected vice president of the plaintiff. The secretary and treasurer of the Soo company have been elected secretary and treasurer of the plaintiff.

VIII. On May 17, 1920, the plaintiff entered into the following agreement with the Soo company:

"Memorandum of agreement made this first day of June, 1920, between the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, hereinafter called the 'Soo Company,' and the Wisconsin Central Railway Company, hereinafter called the 'Central Company.'

"Witnesseth: Whereas the Central company requires the following additional equipment for its railway, to wit: 12 freight locomotives, to be manufactured by the American Locomotive Company, New York, and numbered 3000 to 3011, both inclusive, hereinafter designated as 'freight locomotives'; and

Reporter's Statement of the Case

"Whereas at a special meeting held on the 17th day of May, 1920, the president of the Central company was duly authorized to acquire for its use, said 'freight locomotives'; and

"Whereas the Central company has requested the Soo company to include said 'freight locomotives' in a car trust arrangement which the Soo company is about to make through Wm. A. Read & Company of New York for certain rolling stock required by the Soo company for its own railway, and has also requested the Soo company to advance the purchase price of said 'freight locomotives' for and on behalf of said Central company; and

"Whereas said request was duly granted by resolution adopted by the board of directors of the Soo company at a meeting held on the 18th day of May, 1920; and

"Whereas the Soo company is willing to include said 'freight locomotives' in said car trust arrangement and to advance the purchase price thereof for and on behalf of said Central company, upon the terms and conditions hereinafter set forth.

"Now, therefore, in consideration of the premises and the mutual covenants and agreement hereinafter set forth, it is hereby agreed between the parties as follows:

"1. The Central company agrees to accept said 'freight locomotives' upon the terms and conditions of said car trust arrangement and to pay forthwith to the Soo company upon demand; an initial payment of 25% of the cost of said 'freight locomotives,' plus freight charges from Dunkirk, New York, to Chicago, Illinois, together with inspection fees and all other incidental expenses involved; a cash discount of 4% of the notes, or other evidences of indebtedness, executed and delivered by the Soo company for the purchase price of said 'freight locomotives'; also its equitable proportion of all disbursements and expenses made or incurred in connection with said car trust arrangement, including the expense of underwriting all equipment notes or other evidences of indebtedness, counsel fees, and registration of recording fees; also its equitable proportion of the compensation to be paid to the vendor or vendors, trustee or trustees, pursuant to said car trust arrangement; also to pay to the Soo company beginning June 1st, 1921, and each year thereafter, one-tenth of the remaining 75% of the cost price of said 'freight locomotives'; also to pay semi-annually each year, December 1st and June 1st, interest on all deferred payments of the purchase price of said freight locomotives at the rate of 7% per annum.

"The Central company also agrees to pay such additional sums as may be necessary to cover the expenses of changes, alterations, or additions to the specifications covering such freight locomotives, in short, the Central company agrees to do everything necessary to be done on its part in order to enable the Soo company, without the use of its own funds, to promptly fulfill all its obligations in respect to said 'freight locomotives' in accordance with said car trust arrangement.

"2. The Soo company agrees that it will make for the Central company all payments for said freight locomotives aforesaid and fulfill every obligation in respect thereto imposed by said car trust arrangement. That upon delivery of said freight locomotives it will place the same in service upon the railway of the Central company and subject the same to all the terms of the lease between the parties hereto of April 1st, 1909. That upon the full performance and termination of said car trust arrangement, and the full performance of this agreement by the Central company, the Soo company will cause the title of all of said 'freight locomotives' to be vested in the Central company, subject to the lease dated April 1st, 1909, aforesaid.

"3. It is mutually agreed between the parties that the Soo company shall have and retain a lien upon all of said 'freight locomotives' to secure the due performance by the Central company of all of its obligations aforesaid, and that in case of default by the Central company in providing the necessary funds to make the payments provided for in said car trust arrangement, the Soo company may withdraw any or all of said 'freight locomotives' from the service of the railway of the Central company, and put the same in service upon its own line, or may charge the Central company with such per diem rentals for the same as will secure the payment of the amount in default, or may suffer such default to continue to the end of the term of said car trust arrangement, unless sooner made good, and may then appropriate a sufficient number of 'freight locomotives,' and as it may choose, to reimburse itself for all the expenditures made in fulfillment of said car trust arrangement, for which the Central company has not furnished the necessary funds as provided herein, together with interest at 7% per annum from the date of the default or defaults in respect thereto.

"*In witness whereof*, the parties have caused this agreement to be executed by their presidents or vice presidents, and attested by their secretaries or assistant secretaries

under their corporate seals the day and year first above written.

"Wisconsin Central Railway Company,
"By G. R. Huntington,
"*Vice President.*

"Attest:
"G. W. Webster, *Secretary.*
"Minneapolis, St. Paul & Sault Ste.
Marie Railway Company,
"By E. Pennington, *President.*
"Attest:
"G. W. Webster, *Secretary.*"

Said agreement of May 17, 1920, relating to purchase by plaintiff of locomotives was entered into by plaintiff pursuant to the following resolution of its board of directors unanimously adopted at a meeting held May 17, 1920:

"Whereas the Wisconsin Central Railway Company, hereinafter designated as the 'carrier,' requires for immediate use on its railway twelve (12) additional freight locomotives to be manufactured by the American Locomotive Company, of New York, and numbered 3000 to 3011, both inclusive, hereinafter designated as 'freight locomotives'; and

"Whereas it is to the advantage of the carrier to include said freight locomotives in a car trust arrangement which the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, hereinafter called 'Soo company,' is about to make through William A. Read & Company of New York for certain rolling stock required for use on its railway and to arrange with the Soo company to advance the purchase price for said freight locomotives for and on behalf of this carrier. Now, therefore,

"*Resolved*, That the president or vice president of the carrier be, and he hereby is, authorized to acquire said freight locomotives and with the consent of the 'Soo company' to include the same in said car trust arrangement.

"*Resolved further*, That if the board of directors of the Soo company shall consent to include said freight locomotives in said car trust arrangement and shall authorize its officials to advance the purchase price for said freight locomotives for and on behalf of this carrier, then the president or vice president of the carrier be, and he hereby is, authorized to make with the Soo company, the contract which is herewith submitted dated the 1st day of June, 1920, with such amendments or modifications as may reasonably be required by the Soo company and also to execute and deliver for and in the name of the carrier any other instruments and

Reporter's Statement of the Case

to do any other acts which may be deemed necessary or proper in order to fulfill the purpose of this resolution, and to insure prompt and faithful compliance with all reasonable requirements of the Soo company in the premises."

On March 10, 1922, plaintiff's directors passed a resolution similar to the above resolution approving the purchase by the Soo company of additional locomotives and other equipment for use on its lines during the years 1920 and 1921 and agreeing to reimburse the Soo company for moneys advanced for said equipment.

The following additions were made to plaintiff's equipment during the year 1920:

12 locomotives	$628, 289. 09
Locomotive fire doors	1, 437. 00
Locomotive air pumps and brakes	782. 66
Locomotive engineers' foot warmers	1, 085. 64
Locomotive superheaters	4, 794. 03
Locomotive—Miscellaneous	931. 14
Box car safety appliances	610. 10
Box car—Miscellaneous	153. 24
Box car cover plates	410. 20
Refrigerator cars—Miscellaneous	20. 23
Passenger coaches—Miscellaneous	524. 64
7 company service cars	2, 625. 00
Total	641, 662. 97

The following additions were made to plaintiff's equipment during the year 1921:

Locomotives—Superheaters, fire doors, and air pumps	$13, 093. 25
Locomotives—Electric lights	365. 10
Locomotives—Miscellaneous	190. 87
650 box cars	1, 306, 635. 78
Box cars—Reenforced ends	1, 793. 59
Box cars—End lining	1, 232. 09
Box cars—Center sills	3, 496. 72
Vegetable cars—Miscellaneous	151. 12
25 automobile cars	15, 263. 50
1 flat car	285. 00
Flat cars—Miscellaneous	20. 04
Ballast cars—Draft gears	51. 76
Furniture cars—Draft gears	43. 92
1 dining car	57, 985. 86
3 company service material cars	762. 25
Company service cars—Misc. betterments	1, 221. 87
Rebuilding equipment—Various	268, 459. 42
	1, 671, 052. 14

The Soo company advanced for the purchase of new equipment for plaintiff the sum of $636,825.79 during the period from March 1, 1920, to August 31, 1920, and the sum of $1,390,096.33 during the calendar year 1921.

During the years 1920 and 1921 plaintiff paid its notes in amounts of $355,964.84, $173,415.44, and $128,423.44 in payment for new railway equipment.

IX. During the period beginning June 30, 1919, and ending June 30, 1921, meetings of the stockholders and directors were held as follows:

A meeting of the directors was held on July 7, 1919. At this meeting the directors of the plaintiff approved of the agreement between the Soo company and the Director General in respect to taking over the entire railroad system of the Soo company, including the Chicago division. The Director General required the Soo company to include in this agreement the Chicago division and would not recognize the Wisconsin Central Railway Company as a party.

Another meeting was held on the 3d day of September, 1919. The only business transacted was the adoption of a resolution declaring a semiannual dividend on the preferred stock.

Another meeting was held on the 8th day of October, 1919. The only business transacted was to ratify the leasing of part of the station grounds at Marshfield to one Miller and authorizing him to mortgage the improvements which he was constructing on the premises. This ratification was necessary in order to enable Miller to mortgage the improvements, the Wisconsin Central having title to the station grounds.

The next meeting was held March 9, 1920. A vacancy in the board of directors was filled and certain changes in officers were made. Another semiannual dividend on the preferred stock was declared.

The provisions of section 2094 of the transportation act relating to the Government guaranty of compensation during the six months' period were also accepted.

During Federal control certain changes were made in the trackage and facilities at and near Chippewa Falls and

Eau Claire, Wisconsin, for the joint operation of such facilities owned by the Chicago, Milwaukee & St. Paul Railway Company and the Wisconsin Central Railway Company.

At said meeting held March 9, 1920, plaintiff's board of directors took the action noted in the following minute:

"Whereas the Chicago, Milwaukee & St. Paul Railway Company and the Wisconsin Central Railway Company have for many years jointly operated certain trackage and facilities in Chippewa Falls and between that city and Eau Claire and desire to further extend such joint operation to the end that so far as practicable their railways shall be converted into one railway in and between said cities and jointly operated as such in the interest of economy; and

"Whereas a proposed agreement, dated April 15, 1919, has been prepared to that end and to the satisfaction of the presidents of said companies and the Federal managers of said railways, to which proposed agreement the Director General of Railroads and the Minneapolis, St. Paul & Sault Ste. Marie Railway Company have been made parties, all of which appears by the final draft thereof herewith submitted to the directors; and

"Whereas the directors being fully advised in the premises and believing it for the best interests of this company that such agreement should be made: Now, therefore,

"*Resolved*, That the president and secretary of this company be, and they are hereby, authorized and directed to execute said proposed agreement as submitted to the directors on behalf of this company in quadruplicate originals and affix thereto its corporate seal; and, further,

"*Resolved*, That Walter D. Hines, Director General of Railroads, and Minneapolis, St. Paul & Sault Ste. Marie Railway Company be, and they are hereby, requested to consent to the making of such agreement by joining in the execution thereof; and, further,

"*Resolved*, That a certified copy of these resolutions be furnished to the Director General of Railroads and to the Minneapolis, St. Paul & Sault Ste. Marie Railway Company."

The sale of four parcels of land, no longer required in connection with the operation of plaintiff's railway, for the total sum of $8,665.00 was approved at this meeting. Negotiations for said sale were carried on by the real-estate agent of the Soo company at plaintiff's expense. The proceeds of said sale were disposed of in accordance with the

first general mortgage and first refunding mortgage of plaintiff.

On May 11, 1920, an annual meeting of the stockholders was held. Directors were nominated and elected. The acceptance of section 2094 of the transportation act was approved. The stockholders also approved the execution of the agreement changing the facilities at Chippewa Falls and Eau Claire before referred to.

A meeting of the directors was held May 17, 1920. Officers of the Wisconsin Central were elected. The execution of the agreement before referred to between the plaintiff and the Soo company respecting the purchase and title to such equipment, its allocation to the Chicago division, and the basis for reimbursing the Soo company was approved.

A meeting was held on September 9, 1920. The directors approved of compliance with the regulations of the Department of the Interior respecting the filling of a certain bridge owned by the plaintiff and of the execution of the agreement required by the Department of the Interior. Similar action was taken respecting a quitclaim deed releasing the interest of the plaintiff in a certain alley to which the plaintiff had title. The sale of certain property no longer required for common-carrier purposes to one Atwood, and the proceeds to be disposed of in accordance with the mortgages before referred to was approved. Another semiannual dividend on the preferred stock was declared.

A meeting was held on March 8, 1921. One director resigned and another was elected in his place. A semiannual dividend on the preferred stock was declared. A report was also made of the cremation of certain securities.

The annual meeting of the stockholders of the Wisconsin Central was held at Milwaukee May 10, 1921. Certain persons were nominated and elected as directors.

A meeting of the directors was held May 16, 1921, and the same persons were elected officers of the Wisconsin Central as were elected in 1920.

At the meeting of the stockholders held in 1920, the Soo company voted all of the stock, aggregating 211,896 shares, with the exception of 52 shares which were also voted by representatives of the Soo company.

At the meeting of the stockholders held in 1921, there were voted 222,385 shares of stock. All but 4,000 were voted by representatives of the Soo company, and the owner of the 4,000 voted for the directors nominated by the Soo company.

At a meeting of the board of directors of the plaintiff company held on September 8, 1921, its president and vice president were authorized to execute and deliver to the Soo company, promissory notes of the plaintiff company as follows:

Six promissory notes, each payable on or before 10 years after date, with interest at the rate of 6 per cent per annum, payable semiannually; each of four said notes shall be for the principal sum of $500,000; one of said notes shall be for the principal sum of $100,000, and the remaining note shall be for the sum of $205,822.44, making in all the sum of $2,305,822.44, for which amount the plaintiff was indebted to the Soo company for losses incurred by it in the operation of plaintiff's properties, and for taxes and interest on funded debt for the period from September, 1920, to June, 1921.

In order to secure the said notes the president and vice president of the plaintiff company were authorized to assign and deliver to the Soo company, first and refunding mortgage bonds issued pursuant to such first and refunding mortgage of plaintiff company. The Interstate Commerce Commission refused to approve the issuance of such notes and securities by the plaintiff company and the loan as authorized by plaintiff's board of directors was not consummated.

X. The lease from the plaintiff to the Soo company covered certain land-grant lands owned by the plaintiff. The mortgage required all proceeds from land-grant lands to be turned over to the trustee named in the mortgage. The Soo company also took charge of the land-grant lands. It negotiated certain sales of lands and certain sales of timber thereon; it also negotiated for the leasing of certain iron ore or minerals found in the property. The proceeds of all such transactions, after deducting expenses and taxes, were turned over to the trustees under said mortgage. All ad-

vertising in connection with the sale of such lands was done in the name of the Soo company. All employees connected with this work were employed by the Soo company. Pay rolls, salary vouchers, and expense accounts were made on Soo Line forms. Stationery, letterheads, envelopes, and things of that kind were in the name of the Soo company. The land department, which handled these matters, has always been listed in the Railroad Guide as the land department of the Soo Line. All circulars and maps used in connection with the work were issued in the name of the Soo company. The same is true of newspaper advertising. The Wisconsin Central or its officers or directors have not participated in any of this work, except officers of the Wisconsin Central have executed instruments relating to such lands when change of title was involved.

All expenses connected with the sale and care of said lands were paid out of the income therefrom. The circulars issued by the Soo company advertising said lands for sale showed plainly that they were Wisconsin Central land-grant lands.

The gross sales of land-grant lands, and expenses incurred in connection therewith, during the year 1920 were as follows:

The gross sales of the land department for the year were 13,031.29 acres for	$199, 168. 45
Less cancellations	35, 097. 23
Net sales	164, 071. 22
Town-lot sales (26 lots) amounted to	1, 200. 00
Timber sales amounted to	132, 532. 90
The royalties accrued during the year from iron ore mined from the company's land amounted to	137, 210. 01
The gross receipts from lands, lots, timber, royalties, deferred payments, interest on deferred payments, rents, etc., were	418, 876. 53
The expenses of the land department, including taxes and the cost of caring for the the property, were	110, 555. 05

The gross sales of land-grant lands, and expenses incurred in connection therewith, during the year 1921 were as follows:

The gross sales of the land department for the year were 8,488.79 acres for	$142, 291. 57
Less cancellations	34, 482. 33
Net sales	107, 809. 24
Town-lot sales (280 lots) amounted to	3, 810. 00
Timber sales amounted to	48, 471. 00
The royalties accrued during the year from iron ore mined from the company's land amounted to	73, 835. 79
The gross receipts from lands, lots, timber, royalties, deferred payments, interest on deferred payments, rents, etc, were	357, 844. 81
The expenses of the land department, including taxes and the cost of caring for the property, were	116, 250. 82

XI. The lease under consideration does not require the Soo company to pay any stipulated rental to the plaintiff. It requires the Soo company to account to the plaintiff for the net earnings on the Chicago division, and for this purpose to keep a separate system of accounting for earnings and expenses on the Chicago division during the term of the lease. When the Soo company took possession, an inventory was taken as provided in Article XXVI of the lease. Entries were made on the records of the Soo company, transferring certain accounts from the Wisconsin Central books to the Soo books. From that time on receipts and expenditures in connection with the Chicago division were handled through the Soo books. At the end of each month the earnings and expenses of the system were apportioned between the Soo division and the Chicago division as nearly as possible on the basis of the actual income and expenses of said divisions. All the details covering operation of the Chicago division, such as waybills, per diem records, station records, bills, vouchers, etc., were recorded on the Soo records. The entry on the Wisconsin Central records was a final summing up. The Soo Company made reports to the Interstate Commerce Commission for the entire system, including the Chicago division. Transactions relating to additions and improvements to the Chicago division were also handled through the Soo records. Then a summing up of what was added to the property or deducted from it was impressed upon the Wisconsin Central books. To illus-

trate: Materials and supplies were charged on the Soo company books to begin with to "materials and supplies." It would go into the operating ledger first as a system figure, then if used on the Chicago division it would be posted as used on the Chicago division. So few entries were made in the Wisconsin Central books that it took a very small part of the time of one man. To begin with an effort was made to apportion the earnings between the Chicago division and the Soo division based on the rate in the territory. After 1916, freight earnings were apportioned according to mileage. An effort was made to divide the earnings and expenses fairly. The agreement for Government control was made with the Soo company alone. No entries were made in the records of the Director General respecting the Wisconsin Central. The Soo company transacted all this business and kept all the records. Final settlement was made for the entire system with the Soo company. When the compensation was paid by the Director General it was then apportioned between the Soo division and the Chicago division.

When the lease was made the Soo company was an originating carrier. Its principal traffic, namely, grain and its products, livestock, lumber, and forest products, originated on its own line. It had no line into Chicago. From a traffic standpoint it was desirable for the Soo to have a line into Chicago. This would furnish an outlet for business originating on its line and securing for it the advantage of interchanging with large trunk lines having their termini in Chicago.

XII. Balance sheet of the plaintiff as of July 1, 1919, and June 30, 1920, is made Appendix B to these findings, and is made a part hereof by reference.

Net additions and betterments were made to the Chicago division during this period aggregating $196,277.98. The work was all done and the material was all furnished by the Soo company; where contracts were entered into in connection with the work, they were made in the name of the Soo company.

The net decrease in equipment amounting to $87,868.02 represents equipment owned by the plaintiff and leased to

the Soo company which was destroyed or retired and not replaced.

The increase in the sinking fund of $102,780.99 represents proceeds of the land grant obtained and disposed of as before stated.

The deposit with the trustee of $3,285.00 covers sale of certain property covered by the mortgage no longer required for railroad purposes, and handled by the right of way agents of the Soo company.

Increase in land grant account of $183,412.53 represents merely a change in accounting.

Decrease in material loaned amounting to $12,594.62 represents material returned previously loaned. Decrease in Ashland County courthouse bonds represents bonds retired by Ashland County. Increase in Wisconsin Central Land Company advances represents advances made to the Wisconsin Central Land Company in connection with the purchase of additional right of way by the Soo company in connection with its operation of the Chicago division.

Discount on funded debt amounting to $21,780.79 represents the discount amortized during the period.

Decrease in the first general mortgage bonds amounting to $146,000 represents bonds purchased and retired by the trustee from proceeds of the land grants.

Decrease in the M. & S. T. mortgage bonds of $5,000 represents reduction of outstanding bonds due to the operation of the sinking fund.

Decrease in equipment notes series C, E, and F of $301,162.56 represents retirements and repayments made as provided in the equipment trust agreements.

Increase in audited vouchers of $401,010.37 was largely due to the fact that a voucher of approximately $400,000 was taken into account in favor of the Agents Bank of Montreal to pay interest due on bonds July 1. The actual payment or transfer of cash was made as of July 1, 1920. There was no corresponding transaction as of July 1, 1919, since the interest was both audited and paid during the year ending June 30, 1919.

The increase in tax liability of $262,848.93 represents State and local taxes accrued for the period March 1, 1919, to June

30, 1920. There were no taxes for the period ending June 30, 1919, since they were paid by the United States Railroad Administration.

The earnings, expense account, and the capital-income account were handled as stated in Finding XI.

The material and supplies account of $500,000 represents the inventory value of materials and supplies taken over by the Soo company as of April 1, 1909, when the lease was executed and delivered. Although the amount of material used on the Chicago division has since varied, no change has been made in the fixed figure of $500,000.

The advance account is a segregation of the amounts of cash that the Soo company has paid over into the treasury of the Wisconsin Central to be used in paying the interest on the funded debt.

The cash book contains a separation of the items included therein between the Wisconsin Central Railway and the land department.

During the fiscal years ending June 30, 1920 and 1921, the cash received by the Wisconsin Central Railway Company may be grouped as follows:

Interest on bank deposits made by the Soo company.

Sales of land no longer required for transportation purposes.

Rentals collected by real-estate agent of the Soo company. (Other rentals were taken into Soo Line cash accounts.)

Cash advances from Soo Line.

The payments made from these receipts may be grouped as follows:

Taxes. (Other taxes paid on Wisconsin Central property were paid from the Soo Line cash book.)

Rent of Central Terminal property. (This item occurs on the Wisconsin Central cash book only in 1920; in 1921 the rental was paid by the Soo Line and charged against the Wisconsin Central Railway Company on the Soo Line books.)

Payments to fiscal agents of Soo Line of funds with which to pay maturing interest coupons, dividend checks, and payment back to Soo Line of principal on equipment contracts.

The debit items of the land department represent the amounts collected from the sale of land-grant lands and

the interest on the unpaid land contracts, also iron-ore royalties received from mines on land-grant lands.

Land department credits include the expenses of taxes on the land-grant property and the cost of advertising and selling this land.

In addition are the payments made to the trustees of the Wisconsin Central Railway Company first general mortgage, which mortgage is a first lien on the land-grant lands and under the terms of which the Wisconsin Central Railway Company must pay over to the trustees the net cash receipts. All the records in connection with the operation of land-grant lands are kept and accounted for separately.

Aside from land department items, the largest amounts included in the cash book are the periodical payments by the Soo Line to the Wisconsin Central Railway Company, and the payment by the Wisconsin Central Railway Company of that same money on the same day to the fiscal agents with which to make the principal, interest, and dividend payments mentioned above.

Balance sheet of the plaintiff as of July 1, 1920, and June 30, 1921, is made Appendix C to these findings and is made a part hereof by reference.

XIII. The right-of-way department of the Soo company handled right-of-way matters pertaining to the Chicago division. It was sometimes necessary to acquire more land than needed for right-of-way purposes in order to secure a reasonable price. Where such parcels of land were substantial in character, it would be taken in the name of a subsidiary company to avoid encumbering the title by liens of mortgages of carrier. The Wisconsin Central Land Company was used for this purpose. If disposed of later, conveyance would be executed by the Wisconsin Central Land Company. The business was transacted by the right-of-way department of the Soo company without securing any authority or approval from the Wisconsin Central Railway Company. The officials of the land company executed the deeds or contracts.

Leases of portions of the right of way pertaining to the Chicago division for industrial purposes were made by the

Soo company and in the name of the Soo company, and rentals collected by the right-of-way department of the Soo company were turned over to the treasurer of the Soo company.

During the fiscal year ending June 30, 1920, plaintiff received as rentals from said properties the sum of $8,189.63. During the fiscal year ending June 30, 1921, plaintiff received as rentals from said properties the sum of $7,700.44.

The right-of-way department of the Soo company also handled rental of other property owned by the Wisconsin Central. There was but little of such property. It consisted of old buildings not needed for railroad purposes. In some instances statements or bills were made by agents of the Soo company in the name of the Wisconsin Central covering such rentals.

During the period involved, namely, from July 1, 1919, and ending June 30, 1921, there were nineteen such transactions. These transactions were handled by representatives of the Soo company.

Pursuant to order of the Interstate Commerce Commission, effective January 1, 1919, authorities for expenditure were made out in each case. The authority in each case was made out on forms of the Soo company, designating the Wisconsin Central as owner of the property which had been leased to the Soo company. Each of these authorities was signed by E. Pennington, president, and by G. R. Huntington, vice president and general manager of the Soo company. The Wisconsin Central had no general manager during this period. The business was completed, the deed or contract was executed in each case before the authority was issued.

During the years involved, namely, from July 1, 1919, to June 30, 1921, there were twelve transactions for which plaintiff received the sum of $22,127.30. Negotiations for these sales were handled by representatives of the Soo company at plaintiff's expense. Deeds to said properties were executed by plaintiff except when title was held in name of plaintiff's subsidiary companies, Wisconsin Central Land Company and Tri-State Land Company, in which event the deeds were executed by said companies.

Reporter's Statement of the Case

XIV. Plaintiff's income account for the year ended December 31, 1920, is as follows:

Operating income		$57, 825. 30
Nonoperating income:		
Joint facility rent income	$29, 060. 22	
Miscellaneous rent income	29, 043. 13	
Income from lease of road: U. S. Govt. standard return for operation of W. C. Ry. Co. for January and February, 1920	575, 981. 04	
Estimated amount of guaranteed compensation due from U. S. Govt. thru M. St. P. & S. S. M. Ry. Co., under sec. 209, transportation act of 1920, for period March 1, 1920, to August 31, 1920	1, 727, 943. 10	
Miscellaneous nonoperating physical property	96, 194. 84	
Income from funded securities	6, 132. 49	
Income from unfunded securities and accounts	3, 358. 08	
Total nonoperating income		2, 467, 712. 90
Gross income		2, 525, 538. 20
Deductions from gross income:		
Hire of equipment	89, 811. 20	
Joint facility rents	273, 486. 60	
Rent for leased roads	240, 000. 00	
Miscellaneous rents	6, 000. 00	
Interest on bonds	1, 457, 019. 42	
Interest on equipment obligations	51, 105. 28	
Amortization of discount on funded debt	24, 510. 97	
Miscellaneous income charges	55, 646. 87	
Total deductions from gross income		2, 197, 580. 34
Net income transferred to profit and loss		327, 957. 86

Plaintiff's income account for the year ended December 31, 1921, is as follows:

Net operating revenue		$1, 130, 152. 29
Railway tax accruals	$924, 306. 48	
Uncollectible railway revenue	7, 810. 21	
		932, 116. 69
Operating income		198, 035. 60

Nonoperating income:		
Joint facility rent income	$93, 698. 88	
Miscellaneous rent income	27, 939. 02	
Miscellaneous nonoperating physical property	60, 985. 56	
Income from funded securities	5, 919. 69	
Income from unfunded securities and accounts	1, 943. 48	
Income from sinking and other reserve funds	37. 69	
Miscellaneous income	168, 063. 26	
		$358, 587. 58
Gross income		556, 623. 18
Deductions from gross income:		
Hire of equipment	568, 771. 18	
Joint facility rents	750, 058. 82	
Rent for leased roads	240, 000. 00	
Miscellaneous tax accruals	28, 827. 37	
Interest on funded debt	1, 546, 481. 63	
Interest on unfunded debt	37. 51	
Amortization of discount on funded debt	20, 676. 40	
Miscellaneous income charges	167, 284. 83	
		3, 322, 137. 74
Net deficit transferred to profit and loss		2, 765, 514. 56

XV. The Commissioner of Internal Revenue required the plaintiff to file a return and to pay a capital-stock tax for the year beginning July 1, 1920, and ending June 30, 1921. The plaintiff duly protested the payment of such tax on the ground that it had not been carrying on or doing any business within the meaning of the revenue act. The commissioner decided that the plaintiff was liable for such tax, and required plaintiff to file a return for said taxable year, and assessed against the plaintiff a tax of $11,551, and also required the plaintiff to pay penalties and interest amounting to $785.47, or a total of $12,336.47. Thereafter the plaintiff duly made and filed with said commissioner a claim for abatement of said tax, penalties, and interest so assessed on the ground that the plaintiff had not been carrying on or doing business as aforesaid, and was not subject to such tax, penalties, or the payment of said interest. The said claim for abatement was thereafter wholly rejected by said com-

missioner, and said commissioner demanded from the plaintiff payment of said tax, penalties, and interest. Pursuant to said assessment and demand for payment, plaintiff paid under protest to the commissioner on or about April 18, 1923, said tax, penalties, and interest amounting to $12,336.47. Thereafter and prior to the commencement of this action, plaintiff made and filed with the commissioner its claim for a refund of said payment and a demand for the refund thereof, which claim and demand was on the 3d day of December, 1924, wholly rejected and refused.

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

This is a suit to recover the sum of $12,336.47, assessed against the plaintiff and paid by it under the provision of section 1000 of the revenue act of 1918 (40 Stat. 1057, 1126), as capital-stock taxes for the taxable year ending June 30, 1921.

The plaintiff company was incorporated in July, 1899, for the purpose of maintaining and operating certain lines of railway already constructed, extending from Chicago, Illinois, Minneapolis and St. Paul, Minnesota, and certain points in Wisconsin and Michigan. These lines connected at Minneapolis, and St. Paul, and also at Duluth and Superior, Wisconsin, with the lines of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, commonly known as the Soo company, which owned and operated a railway system extending westward from Minneapolis to the State of Montana, northward to the Canadian border, and eastward into the States of Wisconsin and Michigan.

The Soo company's principal traffic consisted of grain, livestock, lumber, and forest products, originating on its own lines. It desired to obtain an outlet for this traffic to Chicago and to obtain the advantage of an interchange of traffic with the trunk-line railroads having their termini in that city. On April 1, 1909, the plaintiff and the Soo company entered into a contract whereby it was agreed that the Soo company should operate the plaintiff's railways for a period of 99 years. The reasons actuating the plaintiff and

the Soo company in entering into the said agreement are set out in the following pertinent paragraphs of the preamble of the said contract, which reads as follows:

"Whereas, the lines of railway of the lessor and the lessee are so situated at some points that they can be lawfully connected and operated together to constitute one continuous main line, and at other points are connecting and intersecting, and the lessee is authorized to lease and operate the lines of railway of the lessor; and

"Whereas, it is deemed for the best interests of the parties hereto that these various lines of railway should be operated together, while still retaining the separate corporate existence and status in law of the parties hereto; and

"Whereas, in order to effectuate and carry out such purpose, it is essential that there should be but one management and one administration of the operation of the two systems of railway. * * *"

In article one of the instrument the lessor let and demised to the lessee its railways and other properties.

Article two reads as follows:

"The lessee shall, immediately upon the execution of this agreement, have sole control of all said properties and of all operations of said railways, and of every part thereof, and all officers, agents, and employees of the lessor having to do with such control and operation, shall yield prompt and complete obedience to the authority of the lessee with respect to the control and operation of said railways, and other properties covered hereby."

In article three the lessee is granted sole control of all the funds and other assets of the lessor.

Article four provides in part as follows:

"The lessor shall and will maintain during the existence of this lease its corporate existence and organization, and shall and will from time to time, and at all times when necessary, do each and every and all lawful acts requisite to renew, perpetuate, and maintain its corporate existence and organization, and shall and will exercise each and every corporate act which it can now, or at any time hereafter may lawfully exercise to enable the lessee to enjoy and avail itself of and exercise every right, franchise, and privilege hereby granted, and to properly manage and operate the demised premises according to the terms of this lease, and the lessor shall not and will not commit or omit, and shall not suffer

or allow to be committed or omitted, any act whereby the possession, management, and operation by the lessee of the demised premises shall be in any wise abridged or obstructed, or by which the corporate existence and powers of the lessor may be in any wise annulled, abridged, or affected. * * * "

In article five the lessee is granted the right to manage, operate, and administer all the railways and other properties covered by the lease, with the following proviso:

"* * * if in the judgment of the lessee it becomes necessary or expedient to operate any of said railways, terminal facilities, or other appurtenances owned by the lessor, or the use of which is secured to it by lease or other contract, permit, or privilege, by and through the corporate organization of the lessor, the lessee shall have the full right and power to require such operation by the lessor under the direction and supervision, however, of the lessee: *And, provided further*, That all expense of such management and administration shall be paid out of the earnings of the properties hereby demised."

Article six reads as follows:

"The lessor shall and will from time to time hereafter make, do, seal, execute, acknowledge, and deliver, or cause to be made, done, sealed, executed, acknowledged, and delivered, all and such further acts, matters, things, contracts, agreements, leases, and assurances in the law for better assuring and confirming unto the lessee all and singular the premises, estates, leaseholds, and property hereby demised, or intended so to be, as shall be necessary or proper for better effectuating and carrying out the provisions, objects, and purposes of this lease, as may be required by the lessee."

Article nine contains the following provisions:

"The lessor shall provide for such reasonable changes and improvements of its railway and equipment covered hereby, and for the building, lease, or purchase of such reasonable additional railway and equipment as the parties hereto shall from time to time determine for the best interest of the properties of the lessor covered hereby, and shall supply the necessary funds for said purposes in such manner and upon such securities as it shall, with the consent of the lessee, determine to be best: *Provided, however*, That if the lessor shall be unable to supply such necessary funds in the manner and upon the securities consented to by the lessee, then the lessor shall not be required to provide such changes, improvements, additional railway, or equipment."

Article 10 provides that the lessee shall have the right to purchase additional rolling stock and equipment, to be paid for by the lessor.

Article 11 provides for the payment of dividends to the stockholders of the lessor from net earnings.

Article 15 contains the following:

"* * * All expenses that may be incurred for the joint benefit of the railway of the lessor and the railway of the lessee shall be borne by the lessor and lessee in such fair and equitable proportion as may be agreed upon by the parties hereto. * * *"

Articles 16, 17, and 18 contain covenants and agreements that the lessee shall pay interest, taxes, and other expenses out of earnings of the demised railways; shall keep the properties insured; and shall assume and perform all contractual obligations of the lessor.

Article 19 reads as follows:

"The lessee hereby covenants and agrees that it shall and will, so far as it lawfully can at all times, during the existence of this lease, transact over the property hereby demised, all the freight and passenger business which it can control, destined to or through any point or points reached by the railroad lines hereby demised, when such lines can be utilized for such business; and that it shall not and will not during the existence of this lease without the consent of the lessor make any agreement, traffic contract, lease, or paper writing of any kind whatever, which shall in any way directly or indirectly evade in any particular the obligations hereof, or which shall permit any traffic of any kind that might produce a revenue to the lessor to be in any way diverted from the property hereby demised, or to be transacted by any other person or persons, corporation or corporations whatsoever."

In article 21 the lessee is required to keep separate books of accounts with respect to all business of the demised railways.

Article 25 provides for the payment of all expenses of management and operation out of earnings of the railways and other properties of the lessor.

Immediately after the execution of the said contract the plaintiff company turned over to the Soo company its railways, motive power, rolling stock and other equipment, and

certain lands including a large acreage of land-grant lands, and since that time the Soo company has been engaged in the active control and management of the plaintiff's properties under the name of the Chicago division of the Soo system. While the contract entered into between the plaintiff and the Soo company is denominated as a lease in the contract, and while the parties to the contract are designated therein as lessor and lessee, there is no stipulation for the payment of a definite rental to the plaintiff by the Soo system. The general provisions of the contract indicate that the arrangement between the two companies was more in the nature of an operating agreement than an ordinary lease. Under the various articles of the contract the Soo system agrees to efficiently manage, maintain, and operate the plaintiff's railway properties at the plaintiff's cost and to account to the plaintiff for the net profits of the business.

The plantiff was required by the terms of the contract to maintain its corporate existence and organization, and to "exercise each and every corporate act which it can now, or at any time hereafter may, lawfully exercise to enable the lessee to enjoy and avail itself of and exercise every right, franchise, and privilege hereby granted, and to properly manage and operate the demised premises according to the terms of this lease."

The plaintiff has maintained its corporate existence and organization since entering into the contract with the Soo company for the operation of its properties and has from time to time performed such corporate acts as were required and necessary to enable the Soo system to manage and operate the plaintiff's properties in accordance with the provisions and terms of the said agreement.

The sole question to be determined by the court is whether or not the corporate acts of the plaintiff in connection with the operation of its properties subsequent to the execution of its contract with the Soo company, particularly during the taxable year ending June 30, 1921, were of such nature and character as to constitute the "carrying on or doing business" within the meaning of section 1000 of the revenue act of 1918, c. 18, 40 Stat. 1057, 1126, which is as follows:

"(a) That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the revenue act of 1916—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

(c) The tax imposed by this section shall not apply in any year to any corporation which was not engaged in business (or in the case of a foreign corporation not engaged in business in the United States) during the preceding year ending June 30 * * *."

On May 17, 1920, the plaintiff's board of directors at a regular meeting passed resolutions authorizing the purchase of 12 locomotives for use on its lines, the funds for such locomotives to be advanced by the Soo company. Afterwards, on June 1, 1920, the plaintiff entered into an agreement with the Soo company whereby it agreed to reimburse it for the advances made for the purchase of the said locomotives.

On March 10, 1922, the plaintiff company again passed a resolution approving the purchase by the Soo company of the locomotives and other equipment for use on its lines during the years 1920 and 1921, and agreed to reimburse the Soo company for such equipment. The Soo company charged the account of the plaintiff with the sum of $636,825.79 for such equipment purchased during the period from March 1, 1920, to August 31, 1920, and the sum of $1,390,096.33 for such equipment purchased during the year 1921.

During the years 1920 and 1921, the plaintiff paid its notes in the amount of $355,964.85, $173,415.44, and $128,423.44, in payment for new railway equipment.

During the year ending June 30, 1920, the plaintiff received the sum of $168,597.79 from the sale of 11,260,045 acres of land-grant lands, including a small number of town lots, and during the year ending June 30, 1921, the plaintiff received $80,776.46 from the sale of 5,375.65 acres of land-grant land, and during the years ending June 30, 1920, and

June 30, 1921, the plaintiff received upwards of $21,000 from the sale of land other than land-grant lands.

Negotiations for the sale of the lands aforesaid were conducted by representatives of the Soo company, the deeds to the said properties being executed by the plaintiff except in cases where title to such lands was held in the name of the plaintiff's subsidiary companies, the Wisconsin Central Land Company and the Tri-State Land Company, in which case the deeds were executed by said companies.

At a meeting of its board of directors, March 9, 1920, the plaintiff's officers were authorized to execute an agreement providing for the joint operation by the plaintiff and the Chicago Milwaukee & St. Paul Railway of a line of railway extending from Eau Claire to Chippewa Falls, Wisconsin, including certain trackage facilities, which agreement was later duly executed.

At a meeting held on September 9, 1920, plaintiff's board of directors approved the compliance with the regulations of the Department of the Interior respecting the filling of a certain bridge owned by plaintiff and by the execution of an agreement required by the Department of the Interior. Action was also taken approving the making of a quitclaim deed releasing the interest of the plaintiff in a certain alley to which it had title. Also approval was made of the sale of certain property owned by the plaintiff and no longer required for common carrier purposes, also a semiannual dividend was declared on preferred stock.

The plaintiff's board of directors at a meeting held on September 8, 1921, by formal resolutions authorized its president and vice president to issue to the Soo company six promissory notes aggregating the sum of $2,305,822.44 in payment of amounts due the Soo company for losses incurred in operating the plaintiff's properties during the period from September, 1920, to June 1, 1921, the said notes to be secured by the assignment and delivery to the Soo company of the plaintiff's first and refunding mortgage bonds, such notes secured as aforesaid, to be used by the Soo company as collateral in securing additional funds necessary for the proper management, maintenance, and operation of the plaintiff company's properties. The delivery of the notes

and securities authorized by the plaintiff company's board of directors was not consummated because of the refusal of the Interstate Commerce Commission to approve the same.

The plaintiff as before stated maintained its corporate existence at all times subsequent to the execution of its contract with the Soo company, held regular stockholders' and directors' meetings, elected corporate officers, declared and distributed dividends and performed such acts in relation to the management and operation of its properties by the Soo company as it was required to do under the terms of the contract. The Commissioner of Internal Revenue determined and held that these acts of the plaintiff in its corporate capacity constituted "carrying on or doing business" within the meaning of the statute, and levied and collected the taxes in question.

The question of what constitutes "carrying on or doing business" has been before the courts in numerous cases. The decided cases are uniform in holding that a capital stock tax is an excise laid upon the privilege of doing business in a corporate capacity. *Washington Water Power Company* v. *United States*, 56 C. Cls. 76; *Flint* v. *Stone Tracy Company*, 220 U. S. 107, 146.

The rule is also well established that the amount of business transacted by a corporation alone is not determinative of whether or not such corporation is "carrying on or doing business."

In *Von Baumbach* v. *Sargent Land Company*, 242 U. S. 503, 517, it is stated:

"* * * the Act requires no particular amount of business in order to bring a company within its terms. * * *"

In *Edwards, Collector*, v. *Chile Copper Company*, 270 U. S. 452, it was held that where two corporations took part in carrying on one business they were each subject to the tax. The court said:

"There was some suggestion that there was only one business, and therefore ought to be only one tax. But if the one business could not be carried on without two corporations taking part in it, each must pay, by the plain words of the act."

Opinion of the Court

In *Von Baumbach* v. *Sargent Land Company*, *supra*, the court announced the following rule as a test for determining when a corporation is carrying on or doing business:

"It is evident, from what this court has said in dealing with the former cases, that the decision in each instance must depend upon the particular facts before the court. The fair test to be derived from a consideration of all of them is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes."

The *Chevrolet Motor Company* v. *United States*, 64 C. Cls. 211, was a case where the plaintiff corporation, organized primarily for the purpose of manufacturing and selling automobiles, had prior to the taxable periods in question transferred all its assets and good will, exclusive of certain shares of common stock which it then owned in the General Motors Corporation, to that company and retired from the business of manufacturing and selling motor vehicles, this business of the plaintiff corporation being taken over and continued by the General Motors Corporation. While the Chevrolet Motor Company after the transfer of its assets and business to General Motors Corporation owned a majority of the stock of such corporation, it took no part in its corporate capacity in the management and control of the affairs and business of the General Motors Corporation. In passing upon the question of whether certain corporate activities of the Chevrolet Motor Company constituted doing business, this court said:

"Many close and doubtful cases have been before the courts, but where a manufacturing corporation, organized for profit and gain, continues after the disposition and sale of its good will and manufacturing assets to maintain its corporate entity and carry on with its remaining assets, engaging in business transactions inimical to the processes of final liquidation, all of which results in profit to its stockholders, it can hardly escape the classification of doing business. * * *

"If the plaintiff had done no more than receive and distribute dividends upon its General Motors stock to its share-

holders and borrow funds to maintain and increase their value, the contention made for judgment in this case might be meritorious. But the findings disclose that it did a great deal more. While it discontinued to manufacture motor vehicles, it did not reduce its activities to a mere holding company. It continued a series of business transactions designed and intended to facilitate the successful conduct of the corporation in which it owned a controlling stock interest. * * *

"While plaintiff's officers drew no salary and it maintained no expensive organization and had reduced its overhead to the minimum, a fact accounted for in the transfer of the entire organization of the plaintiff to the General Motors Corporation on the date of sale, nevertheless it continued to function in a way that clearly demonstrates that what was done was not a mere passive, inert activity looking toward the liquidation of its assets or the usual activities of a holding company, but a lively participation in the activities of two other corporations linked with it, and whose success and profits redounded beneficially to the plaintiff. The plaintiff loaned its corporate powers to other corporations, engaged in and became an important instrumentality in their business transactions. Surely this is carrying on business. If not, it is difficult to characterize it."

We believe the activities of the plaintiff in this case constituted the "carrying on or doing business" within the principles announced in the cases cited. During the taxable period in question the plaintiff purchased locomotive cars and other equipment for use in the operation of its railways; entered into obligations and agreements with respect to an additional right-of-way; executed conveyances to numerous parcels of real estate owned by it; issued its promissory notes for sums of money; entered into a contract or lease for the operation of another line of railroad for use in the operation of its properties; kept its corporate organization intact; elected corporate officials from time to time, and declared and distributed dividends among its stockholders.

These activities on the part of the plaintiff were all necessary acts to enable the Soo company to maintain and operate the plaintiff's railway properties in accordance with the terms and provisions of the lease or agreement entered into by and between plaintiff and the Soo company. These

activities were not, in our opinion, merely incidental to the operation of the plaintiff's railway properties by the Soo company but were essential and necessary acts in the operation of the properties. They were acts that could not have been performed by the Soo company, acting in its own name.

While the Soo company under its contract with the plaintiff had the active control and management of the plaintiff's properties, and while the corporate activities of the plaintiff company before stated were performed on the orders and by the direction of the Soo company, they were nevertheless the acts of the plaintiff company in its own corporate capacity.

The plaintiff had obligated itself in article 4 of the contract to "maintain its corporate existence and organization, * * * and exercise each and every corporate act which it can now or at any time hereafter may lawfully exercise to enable the lessee to enjoy and avail itself of and exercise every right * * * to properly manage and operate the demised premises according to the terms of this lease. * * *"

The corporate activities of the plaintiff were in strict accord with the terms of the contract, and while such activities were not numerous, and were perhaps not of major importance, they were nevertheless required for the proper management and operation of the plaintiff's properties by the Soo company.

These facts bring the plaintiff company within the rule announced in *Edwards, Collector*, v. *Chile Copper Company*, *supra*, that where a business can not be carried on without two corporations taking part in it, they are each liable for the tax.

The plaintiff was engaged in the "carrying on or doing business" within the meaning of the taxing statute, and the Commissioner of Internal Revenue properly and legally assessed and collected the taxes in question.

Plaintiff's petition is accordingly dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

ANDREWS STEEL CO. v. THE UNITED STATES[1]

[No. J-388. Decided June 2, 1930]

On the Proofs

Income and profits tax; interest on credit; when credit "taken."—See *Pottstown Iron Co.* v. *United States*, 69 C. Cls. 427; *West Leechburg Steel Co.* v. *United States*, id. 461; *Atlas Powder Co.* v. *United States*, id. 558.

Same; set-off of interest on credit against interest on unpaid tax.—(1) For the taxable year 1917 the Commissioner of Internal Revenue on August 23, 1922, claim for a credit thereof having been filed on or about April 12, 1920, determined an overassessment, which had been paid without protest, and on September 6, 1922, credited the same against an unpaid balance, regularly returned by the taxpayer, of the original income and profits tax for 1919. *Held*, that interest was not allowable to the taxpayer on the amount so credited inasmuch as the taxpayer's liability for interest under the provisions of sec. 250 (a) and (e) of the revenue act of 1918 in respect of the unpaid balance of the original tax reported on the return for 1919 arose prior to the date on which the Government became liable under sec. 1324, revenue act of 1921, for interest upon the overpayment for 1917.

(2) For the taxable year 1918 the Commissioner of Internal Revenue on August 23, 1922, claim for a credit thereof having been filed on or about April 12, 1920, determined an overassessment, which had been paid without protest, and on September 6, 1922, credited the same against an unpaid balance, regularly returned by the taxpayer, of the original income and profits tax for 1920. *Held*, that no interest was allowable to the taxpayer on the amount so credited beyond the dates when the several installments were due on the unpaid balance for 1920, since after such due dates the interest for which the taxpayer was liable upon the installments offset the interest for which the Government was liable.

The Reporter's statement of the case:

Mr. Robert T. Tedrow for the plaintiff.

Mr. Charles R. Pollard, with whom was *Mr. Charles F. Kincheloe*, for the defendant. *Messrs. Assistant Attorney General Herman J. Galloway* and *Ralph E. Smith* were on the brief.

[1] Certiorari applied for.

The court made special findings of fact, as follows:

I. Plaintiff, a Kentucky corporation, filed its income and profits tax returns for 1917 on March 30, 1918, showing a tax of $1,762,248.11, which was paid on June 15, 1918.

Subsequently, the Commissioner of Internal Revenue made an additional assessment for this year of $11,975.70, which was paid.

II. June 17, 1919, plaintiff filed a consolidated income and profits tax return for 1918 showing a tax due by it and its affiliated companies of $929,276.70, which was paid in four installments of $212,000 on March 15, 1919; $252,638.35 on June 16, 1919; $232,319.18 on September 12, 1919; and $232,319.17 on December 15, 1919.

III. On April 8, 1920, after an extension of time, plaintiff filed a consolidated income and profits tax return for 1919 showing a tax due by it and its affiliated companies of $121,792.22. At the time of filing this return plaintiff filed a claim for credit asking that $121,792.22, income tax for 1914 to 1916, and income and profits tax for 1917 and 1918 be applied as a credit against the unpaid original income and profits tax shown on the return in that amount for 1919.

IV. March 15, 1921, plaintiff filed a consolidated return for 1920 showing a tax due by it and its affiliated companies of $734,637.11, $564,336.90 of which was paid in four installments of $58,512.47 on March 17, 1921; $161,082.07 on June 16, 1921; and $172,371.18 each on September 16 and December 16, 1921, leaving an unpaid balance of $170,300.21.

At the time of the filing of this return plaintiff filed a claim for the credit asking that $125,147.81 of the tax paid for 1917 and 1918 be applied as a credit against the unpaid balance in that amount of the first installment of the tax reported on for 1920. June 14, 1921, it filed a claim for the abatement of $45,152.41 of the tax for 1920 alleged to have been erroneously assessed.

V. Subsequent to the filing of the original returns for 1917, 1918, 1919, and 1920, the plaintiff at various times filed amended returns for those years.

VI. October 15, 1921, the Commissioner of Internal Revenue notified plaintiff in writing of the allowance of its claim

for the credit of $121,792.22 mentioned in Finding III to the extent of $29,906.56 and the rejection thereof for the balance in the amount of $91,885.66. The allowance of claim for credit was based upon overassessments of $248.30 for 1915, $454.41 for 1916, and $29,203.85 for 1917.

VII. After an examination and audit of the returns for the years 1909 to 1919, inclusive, the commissioner on August 23, 1922, notified plaintiff in writing of his determination of underpayments totaling $5,509.53 for the years 1909 to 1913, inclusive, of overassessments of $1,342.32 for the years 1914 to 1916, inclusive, $150,532.63 for 1917, and $783,977.28 for 1918, and an underpayment of $9,606.32 for 1919—the total of the underpayments being $15,115.85 and the total of the overassessments being $935,852.23.

VIII. August 25, 1922, the commissioner made additional assessments of the deficiencies for the years 1909 to 1913, inclusive, and for the year 1919. An overpayment of $166.12 for 1914 was applied as a credit against the additional assessment for 1909, together with the overpayment of $253.36 for 1915 and $621.75 of the overpayment of $922.84 for 1916, leaving a balance of said overpayment for 1916 in the amount of $301.09 which was applied as a credit against the additional assessment for 1910 in the amount of $1,453.59, leaving an unpaid balance of the deficiency for 1910 of $1,152.50.

IX. August 26, 1922, the commissioner approved a schedule of overassessments designated Schedule IT:A:2457, Form 7777, embracing overassessments in favor of the plaintiff of $150,532.63 for 1917 and $783,977.28 for 1918. This schedule was transmitted to the collector for the district of Kentucky for his action in accordance with the directions appearing thereon. The collector complied and on August 31, 1922, returned the schedule to the commissioner together with a schedule of refunds and credits designated as Schedule IT:R:2457, Form 7777–A.

On September 6, 1922, the Commissioner of Internal Revenue signed and approved the schedule of refunds and credits certified to him by the collector of internal revenue authorizing the issuance of Treasury checks in the amounts of $44,873.44, the net amount of the 1917 overpayment refund-

able, and $612,081.81, the net amount of the 1918 overpayment refundable.

X. Of the overpayment of $150,532.63 for 1917, the amount of $1,152.50 was credited to the balance of the additional assessment of tax for 1910 referred to in Finding VIII above; $1,067.70 was credited to the additional assessment for 1911, $1,507.21 was credited to the additional assessment for 1912, $440.43 was credited to the additional assessment for 1913, $9,606.32 was credited to the additional assessment for 1919, and $91,885.66 was credited to the unpaid balance of the original tax for 1919, leaving a balance of $44,873.44 to be refunded.

Of the overpayment of $783,977.28 for 1918, the amount of $170,300.21 was credited to the unpaid balance of the original tax due for 1920, $1,596 to the net additional assessment of tax made against one of the subsidiaries, Globe Iron Roofing & Corrugating Company, for the years 1909 to 1917, inclusive, leaving a balance of $612,081.81 to be refunded.

XI. In determining the amount refundable for 1917 the commissioner made a double allowance of $29,203.85 inasmuch as that amount had been credited as shown in Finding VI. After repeated demands by the collector plaintiff by certified check returned to the disbursing clerk of the Treasury Department the amount of $29,203.85.

XII. June 18, 1926, the Commissioner of Internal Revenue approved another schedule of refunds and credits on Form 7805-A, designated Schedule IT:I:11675, and on July 15, 1926, he mailed to plaintiff copies of notice of interest allowance of $1,759.72 for 1917 and $74,264.29 for 1918, together with Treasury checks therefor.

XIII. November 14, 1927, the commissioner approved another schedule of overassessments, Form 7920, designated Schedule IT: 27077. November 16, 1927, he mailed plaintiff copies of notice of interest allowance for additional interest of $1,572.85 for 1917 and $1,285.74 for 1918.

The total amount of interest allowed on the overpayments for 1917 and 1918 was determined as follows:

1917

Amount of overassessment	Amount credited	Amount refunded	Interest allowed From—	Interest allowed To—	Interest
$150, 532. 63	----------------	$15, 669. 50	10–12–20	9– 6–22	$1, 788. 05
	$13, 773. 53	----------------	10–12–20	8–25–22	1, 544. 52
					3, 332. 57

1918

Amount of overassessment	Amount refunded	Amount credited	Interest allowed From—	Interest allowed To—	Interest
$783, 977. 28	$612, 081. 07	----------------	10–12–20	9– 6–22	$69, 844. 31
		$125, 146. 80	"	3–15–21	3, 190. 39
		22, 577. 21	"	6–15–21	914. 22
		11, 288. 10	"	9–15–21	626. 41
		11, 288. 10	"	12–15–21	795. 73
		1, 596. 00	"	8–25–22	178. 97
					75, 550. 03

No interest has been allowed on that portion of the overpayment for 1917 which was credited to the unpaid balance of the original tax due and reported on the return for 1919 in the amount of $91,885.66, or on the amount of $29,906.56 referred to in Finding VI. The matter of interest on the last-mentioned amount of $29,906.56 is not in controversy.

XIV. No interest has been assessed against or paid by plaintiff on the deficiencies in tax for the years 1909 to 1913, inclusive, or for the year 1919, set forth in Finding VIII.

XV. Plaintiff requested the commissioner to allow and pay additional interest on the overpayments for 1917 and 1918 credited and refunded as shown in Finding XIII, to September 6, 1922, with which request the commissioner refused to comply.

The court decided that plaintiff was entitled to recover, in part.

LITTLETON, *Judge*, delivered the opinion of the court:

There is no controversy with reference to the interest paid by the commissioner upon the amounts refunded. The con-

troversy relates to the computation of interest upon the overpayments for 1917 and 1918 credited against the tax due for other years.

The first question is as to the date on which the commissioner allowed the credit within the meaning of section 1324 of the revenue act of 1921. The defendant contends that the credit was allowed on August 25, 1922, the date when the commissioner first signed the schedule of overassessments for transmission to the collector, while the plaintiff contends that the credits were allowed within the meaning of the act on September 6, 1922, when the commissioner signed the schedule of refunds and credits certified to him by the collector authorizing the disbursing clerk of the Treasury to pay the amounts shown to be refundable and interest.

The second question is whether, in providing for the payment of interest on credits to the date of the allowance of claim for credit, the act intended to give the Government the right to collect interest on the unpaid installments of the tax reported and due on the return of the taxpayer for years prior to 1921 against which unpaid installments the credits were applied.

As to the first question relating to the date on which the commissioner allowed the credit, the position of the plaintiff is correct. *Girard Trust Co.* v. *United States*, 270 U. S. 163; *Swift & Co.* v. *United States*, 68 C. Cls. 97; *Boston Buick Co.* v. *United States*, 27 Fed. (2d) 395, affirmed 35 Fed. (2d) 560; *West Leechburg Steel Co.* v. *United States*, H–203; *Atlas Powder Co.* v. *United States*, J–151; and *Pottstown Iron Co.* v. *United States*, H–229, decided by this court April 7, 1930. [69 C. Cls. 461, 558, 427.]

On the second issue, the plaintiff contends that it is entitled to additional interest on the amounts credited against the original tax for 1919 and 1920 from the due dates of the tax for those years to which the commissioner computed interest to September 6, 1922, the date when the commissioner allowed the credit; that it is entitled to additional interest upon the amounts credited against the additional assessment of $1,596 for 1920 from August 25, 1922, the date when the commissioner first signed the schedule of overassessments to

September 6, 1922, the date when he allowed the credit. The defendant insists that it was not intended by the enactment of section 1324 (a) of the revenue act of 1921 to provide for the payment of interest on overpayments of tax credited against a tax due for subsequent years without charging a corresponding amount of interest on the amount due and unpaid, and that it is immaterial whether interest be computed to the due date of the original tax against which the sum was credited or to the date of the allowance of the credit, since each computation of interest offsets the other. In other words, it is the contention of the defendant that the tax is a debt and that the United States has a common-law right to charge the taxpayer interest on the tax from the date it is due.

The defendant computed and paid interest on the overpayment for 1917, $13,773.53 of which was credited to additional assessments for the years 1910 to 1913, inclusive, and $91,885.66 of which was credited against the unpaid original 1919 tax and on the overpayment for 1918, $170,300.21 of which was applied as a credit against the unpaid original installments of tax for 1920, and $1,596 of which was credited against an additional assessment for the years 1909 to 1917, inclusive, and the plaintiff claims additional interest upon the amounts so credited as follows:

1917

Interest allowed and paid by Government

Amount of overpayment	Amount credited	Amount refunded	Interest allowed		Interest
			From—	To—	
$150,532.63	....	$15,669.50	10-12-20	9-6-22	$1,788.05
	$13,773.53	....	[1] 10-12-20	[2] 8-25-22	1,544.52
	91,885.66	....	None.	....	....
					3,332.57

[1] 6 months after filing claim for credit.
[2] Date the schedule of overassessments was first signed by commissioner.

Opinion of the Court

Additional interest claimed by plaintiff

Amount credited	Interest claimed		Additional interest
	From—	To—	
$13,773.53	8–25–22	[3] 9–6–22	$27.17
91,885.66	10–12–20	[3] 9–6–22	10,485.12

[3] Date on which the commissioner signed and approved the schedule of refunds and credits certified by the collector and authorized the disbursing clerk to pay.

1918

Interest allowed and paid by Government

Amount of overpayment	Amount refunded	Amount credited	Interest allowed		Interest
			From—	To—	
$783,977.28	$612,081.07	------------	10–12–20	9–6–22	$69,844.31
		$125,146.80	[1] 10–12–20	[4] 3–15–21	3,190.39
		22,577.21	[1] 10–12–20	[4] 6–15–21	914.22
		11,288.10	[1] 10–12–20	[4] 9–15–21	626.41
		11,288.10	[1] 10–12–20	[4] 12–15–21	795.73
		1,596.00	[1] 10–12–20	[2] 8–25–22	178.97
					75,550.03

Additional interest claimed by plaintiff

Amount credited	Interest claimed		Additional interest
	From—	To—	
$125,146.80	3–15–21	[3] 9–6–22	$11,090.06
22,577.21	6–15–21	[3] 9–6–22	1,662.05
11,288.10	9–15–21	[3] 9–6–22	661.66
11,288.10	12–15–21	[3] 9–6–22	492.31
1,596.00	8–25–22	[3] 9–6–22	3.15

[1] 6 months after filing claim for credit.
[2] Date the schedule of overassessments was first signed by commissioner.
[3] Date on which the commissioner signed and approved the schedule of refunds and credits certified by the collector and authorized the disbursing clerk to pay.
[4] Due dates of installments of the tax shown on the original return for 1920 against which the credit was applied.

The question of interest on the overpayment of $13,773.53 for 1917 credited against additional assessments for 1910 to 1913, inclusive, and on $1,596 of the overpayment for 1918 credited against additional assessments for 1909 to 1917, inclusive, is entirely disposed of by our decision on the first

issue. Interest on these credits should therefore be computed from October 12, 1920, to September 6, 1922. There is left under the second issue the questions whether plaintiff is entitled to interest upon that portion of the 1917 overpayment of $91,885.66 credited against the unpaid installments of the original tax reported for 1919, upon which the commissioner computed no interest, and whether it is entitled to additional interest upon that portion of the 1918 overpayment amounting to $170,300.21 credited against the unpaid installments of the original tax reported for 1920 as set forth in the above tabulation, and upon which the commissioner allowed and paid interest from six months after the filing of the claim for credit to the dates on which the installments of the original tax for 1920 were due.

As shown in Findings III and IV, plaintiff paid none of the tax due on the return for 1919, and paid only a portion of the installments of the tax reported on the return for 1920. In applying a portion of the 1917 overpayment as a credit against the unpaid balance of the original tax for 1919, and a portion of the overpayment for 1918 against the unpaid balance of the installments of the original tax for 1920, the commissioner allowed no interest on the 1917 overpayment credited against the 1919 tax and allocated the amount of the 1918 overpayment credited to the unpaid portion of the four installments of the tax for 1920 and allowed interest on the amounts so allocated and credited to the dates on which the installments became due in March, June, September, and December, 1921. Plaintiff insists that it should have been paid interest upon these credits from October 12, 1920, to September 6, 1922.

We are of opinion that plaintiff is not entitled to any additional interest upon the amounts credited against the unpaid portion of the original tax reported and due upon the returns for 1919 and 1920. We think the Commissioner of Internal Revenue was correct in refusing to compute interest in respect of these items to the date of the allowance of the credit, not because of any common-law right to charge interest on taxes due and offset such interest against interest provided by the statute in the case of credits but because of the provisions of section 250 (a) and (e) of the

Opinion of the Court

revenue acts of 1918 and 1921 which provide that if any installment of the tax shown upon the return is not paid when due, the whole amount of the tax unpaid shall become due and payable upon notice and demand by the collector, and that if any tax remains unpaid after the date when it is due, and for ten days after notice and demand, interest shall be added from the time it became due.

Subdivision (h) of section 250 of the revenue act of 1921, 42 Stat. 264, makes the provisions of subdivision (e), with reference to interest and penalty for failure to pay, applicable to the assessment and collection of the tax which has accrued under the revenue act of 1917 or the revenue act of 1918. This section also provides that in the case of first installments the instructions printed on the return shall be deemed sufficient notice of the date when the tax is due and sufficient demand, and the taxpayer's computation of tax on the return shall be deemed sufficient notice of the amount due. Section 1324 of the revenue act of 1921 provided for the payment of interest to the taxpayer upon the allowance of a claim for credit at the rate of ½ of 1 per cent a month to the date of allowance, first, if the amount was paid under specific protest from the date of the payment of the tax. This provision does not apply to this issue. Secondly, the interest was payable if the amount used as a credit was not paid under protest but pursuant to an additional assessment, from the time the additional assessment was paid. This provision has no application to the items now under discussion. Thirdly, it was provided that interest should be paid to the date of the allowance upon the amount used as a credit from six months after the filing of the claim for credit if the amount was not paid under protest nor pursuant to an additional assessment. The items credited against the original tax for 1919 and 1920 fall under this provision of the statute. The revenue acts of 1918 and 1921 specifically provide for the collection of interest by the Government upon failure of the taxpayer to pay the installments of the tax reported when due and there is no provision in either statute relieving it from this liability because of the filing of a claim for credit. We have in this case, therefore, a situation where the plaintiff was liable for interest upon

that portion of the tax reported on the original returns but not paid when it was due and which was satisfied by the crediting of a portion of overpayments of tax for prior years, upon which credits the Government was liable for interest. In making the credits of the overpayments for 1917 and 1918 against the unpaid installments of the original tax for 1919 and 1920, the commissioner, therefore, correctly offset interest for which the plaintiff was liable against interest for which the defendant was liable. Whether the commissioner was correct in charging the plaintiff with interest on the unpaid installments for 1919 and 1920 at the rate of ½ of 1 per cent a month instead of 1 per cent a month we are not called upon to decide, because this matter is not in controversy. In doing so he followed art. 1035, reg. 62, which provides that the filing of a claim for credit against the tax due on another return shall be subject to the same rules with respect to the addition of interest and penalty as if the taxpayer had filed a claim for abatement of the tax against which credit is desired. In any event plaintiff has no right to complain because the commissioner charged it only with the amount of interest for which the Government was liable on that portion of the overpayments applied as a credit.

Plaintiff's liability for interest under the provisions of section 250 (a) and (e) of the revenue act of 1918 in respect of the unpaid portion of the original tax reported on the return for 1919, amounting to $91,885.66, arose prior to the date on which the defendant became liable for interest upon the overpayment of that amount for 1917. No interest at all was therefore allowable upon this item.

On the other item of $170,300.21 of the overpayment for 1918 credited against the unpaid installments of the original tax reported for 1920, the commissioner allowed interest from a date six months after the filing of the claim for credit to the dates on which the 1920 installments became due. From and after such dates the interest for which the plaintiff was liable upon these installments offset the interest for which the defendant was liable and no additional interest is allowable.

Plaintiff is entitled to recover $30.32, being additional interest of $27.17 on the credit of $13,773.53 from August 25, 1922, to September 6, 1922, and $3.15 as additional interest on the credit of $1,596 from August 25, 1922, to September 6, 1922, for which judgment will accordingly be entered. It is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

MASCOT OIL CO. v. THE UNITED STATES[1]

[No. K-67. Decided June 2, 1930]

On the Proofs

Income and profits tax; deposit of additional tax in escrow; payment after period of limitations; contract substituted for tax liability.—Where before passage of the revenue act of 1926 but after the period of limitation for collection a taxpayer deposits with a bank in escrow a sufficient sum to ensure payment of the tax finally determined to be due, and thereafter pays the tax instead of the bank, the tax so paid can not be recovered. The collection under such circumstances was not made on the ground that the tax was due, but was based on a contract to pay. The deposit having been made prior to the effective date of section 1106 (a) of said act, the liability for the tax had not been extinguished and the contract was upon a valid consideration.

The Reporter's statement of the case:

Mr. Theodore B. Benson for the plaintiff.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. McClure Kelley* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation and in August, 1919, duly filed its corporation income and profits tax return for the calendar year 1918, showing a tax to be due thereon of $58,138.49, which amount was accordingly assessed, and $43,603.86 was paid during the year 1919, $330.22 thereof

[1] Certiorari applied for.

Reporter's Statement of the Case

was credited November 16, 1925, from an overassessment for the year 1917, leaving an unpaid balance of $14,204.41, which amount was abated April 28, 1926.

II. In December, 1919, the plaintiff filed with the collector a claim in abatement for the year 1918 in the sum of $17,492.81, and during the month of July, 1920, the Commissioner of Internal Revenue assessed a further and additional tax against the plaintiff in the sum of $38,030.51, of which $4,334.38 was paid August 24, 1920, and $4,849.49 abated April 28, 1926, leaving an unpaid balance of $28,846.64.

III. In August, 1920, the plaintiff filed a claim in abatement for the sums of $8,664.29 and $33,696.13, covering the years 1917 and 1918, respectively.

IV. On September 18, 1925, plaintiff deposited in escrow with the Farmers & Merchants National Bank of Los Angeles the sum of $65,000 to insure payment of the tax finally determined to be due for the years 1917 and 1918. On October 10, 1925, the said bank addressed a letter to the collector of internal revenue and stated:

"* * * please be advised that the Mascot Oil Company deposited with this bank on September 18th the sum of sixty-five thousand dollars ($65,000.00), and we are authorized by the said Mascot Oil Company to pay you up to this amount upon your final determination of the amount due from the Mascot Oil Company as additional tax for the years 1917 and 1918, and that said payment will be made to you upon your demand."

V. On the day following that on which the deposit was made in the bank, as hereinabove recited, the plaintiff and the commissioner signed an income and profits tax waiver, whereby the taxpayer waived "any period of limitation as to the time within which distraint or a proceeding in court may be begun for the collection of the tax," as provided in section 278 (d) of the existing revenue act for the years 1917 and 1918, the same to remain in effect until December 31, 1926. On March 29, 1926, the plaintiff signed and forwarded to the Commissioner of Internal Revenue a "waiver of right to file a petition with the U. S. Board of Tax Appeals * * * under section 274 (a) of the revenue act

of 1926," and consented to the assessment and collection of a deficiency in tax for the year 1918 aggregating $29,177.06. A proviso was attached thereto that the waiver did not extend the statute of limitation for refund or assessment of the tax and that the waiver is not an agreement as provided under section 1106 of the revenue act of 1926.

VI. The claim in abatement filed in December, 1919, in the sum of $17,492.81, and also the claim in abatement filed in August, 1920, for $33,696.13 for the year 1918, were allowed for $19,053.70 and rejected for $32,135.24.

VII. On May 28, 1926, the collector made demand on the plaintiff for the sum of $28,846.64 representing unpaid balance of taxes alleged to be due for the year 1918, which the plaintiff paid under protest on June 8, 1926. Whereupon the collector withdrew all claim upon the deposit which had been made to guarantee payment for such tax.

VIII. On October 28, 1928, the plaintiff duly filed a claim for refund in the amount of $28,846.64, being the amount of additional taxes paid for the year 1918 as aforesaid. The ground of the claim for refund was that the taxes were collected after the expiration of the period of limitation. This claim for refund was rejected by the commissioner.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This action is begun to recover taxes which had been paid after the period of limitations had run against their collection. Counsel for plaintiff supports its case by the same line of argument that was presented to this court in *Oak Worsted Mills* v. *United States*, 68 C. Cls. 539, and *Gotham Can Co.* v. *United States*, 68 C. Cls. 749, in both instances adversely to the plaintiffs therein. In the *Oak Worsted Mills case*, *supra*, we held that sections 607 and 611 of the act of 1928 prevented a recovery. In the *Gotham Can Co. case*, *supra*, we held that section 1106 (a) of the act of 1926 was of no benefit to the plaintiff where the taxes in question had been collected prior to the time when the revenue bill of 1926 went into effect unless it was shown that the taxes were overpaid. It was expressly stated, however, in that decision that

the court did not pass on the effect of the provision in the revenue bill of 1928 which repealed section 1106 (a) of the act of 1926 as of the date of its enactment. In the case at bar, it appears that the taxes in controversy were collected after the 1926 act went into force. The decision in the *Gotham Can Co. case* is therefore not controlling herein because it does not determine the construction or effect of section 1106 (a) when the taxes were collected after the period of limitations had expired and the 1926 act was in force. But we do not find it necessary to determine the question left open by the *Gotham Can Co. case* for the reason that the defendant sets up an entirely new and different defense from anything pleaded in the two cases cited above and insists that the facts shown in support of this defense are sufficient by themselves and alone to warrant a judgment in its favor.

This defense is that the evidence shows that the plaintiff had made a deposit in a bank as a guaranty of the payment of the taxes in controversy when finally determined. In consideration of this deposit, the bank advised the collector of internal revenue that it would pay the amount of taxes finally determined by the commissioner to be due from the plaintiff, the case was held up until determination had been made, and thereafter when such taxes were finally determined the plaintiff paid the amount thereof and obtained a release of the deposit. The defendant contends that the principles laid down in the case of *United States* v. *John Barth Co.*, 279 U. S. 370, in any event prevent the plaintiff from recovering the refund in controversy. In that case the Government brought suit to enforce a bond given by the defendant and its surety for the payment of taxes, and the defense was made that payment was exacted after the collection of the tax was barred by the statute of limitations. The court said that neither the statute of limitations nor section 1106 (a) of the revenue act of 1926 applied to an action upon a bond, and the signers of the bond were not relieved from the obligations arising out of that instrument. The court further said that—

"* * * the taxpayer was permitted by a bond temporarily to postpone the collection and to substitute for his

tax liability his contract under the bond. The object of the bond was not only to prevent the immediate collection of the tax but also to prevent the running of time against the Government."

Judgment was accordingly rendered against the taxpayer.

It is true that in the case last cited the bond was filed prior to the time when the statute of limitations expired and in the instant case the deposit was made in the bank and the guaranty given of payment after the statute had run against the collection of the tax. We are nevertheless clear that this does not alter the situation, and that the principles announced in the *John Barth Co. case*, *supra*, determine the case at bar. In the instant case, the deposit was made and the guaranty given prior to the enactment of the 1926 act. Conceding for the purposes of the argument only that when the 1926 act was passed, section 1106 (a) thereof extinguished the liability for taxes collected after the statute of limitations had run and enabled a suit to be brought to recover the amount paid, it still must be said that the liability existed prior to the enactment of that act. In fact, the passage of section 1106 (a) showed that Congress recognized that the liability did exist. This, as we observed in the *Gotham Can Co. case*, was in pursuance of the well-known principle—so well established as to need no citation of authorities—that the statute of limitations or other bar against a remedy for the collection of a debt does not extinguish the liability therefor.

As the liability for the tax still existed at the time when the deposit was made in the bank for its payment, the contract which the bank made to pay whatever amount might finally be determined to be the tax, was made upon a valid consideration both as to the plaintiff and the bank. The bank did not, it is true, pay the tax itself as the agreement provided. The plaintiff paid the tax and thereby discharged the liability of the bank. But whether paid by plaintiff or the bank, the result was the same. The collection was not made on the ground that a tax was due, but was based on a valid contract to pay a certain amount when it was determined by the commissioner. The tax fixed the sum to be paid, but the payment and collection was by virtue of the contract and not by reason of the tax liability, and

the payment therefore can not be recovered by plaintiff. We hardly think it is necessary to cite authorities to show that the moral obligation to pay a valid debt is sufficient legal consideration for a subsequent new promise to pay if made either before or after the bar of the statute has become complete, and that the new promise based upon such moral obligation is binding upon the debtor and may be shown in avoidance of the statute of limitations. But see the numerous decisions, both State and Federal, listed on this point under section 569, page 1099, of 37 Corpus Juris.

Counsel for plaintiff urge that the waiver which was executed the day following that on which the deposit was made in the bank is invalid, first, because it was executed after the statute of limitations had run, and, second, because it was so restricted by its terms as not to apply to the conditions in the case at bar. But these matters do not affect defendant's right to retain the money paid pursuant to the guaranty. While we have no necessity for considering them, it might be said that in the case of *Charles H. Stange* v. *United States*, 68 C. Cls. 395, we held that a waiver was not invalid simply for the reason that it was executed after the expiration of the period of limitations.

Without considering the other questions arising in the case, we hold that by reason of the deposit and guaranty the plaintiff is not entitled to recover herein and it is ordered that its petition be dismissed.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

ANGFARTYGSAKTIEBOLAGET TIRFING v. THE UNITED STATES

[No. E-88. Decided June 2, 1930]

On the Proofs

Jurisdiction; suits-in-admiralty act; scope; demurrage; cargo discharged at foreign port; impossibility of libel in rem.—The suits-in-admiralty act, March 9, 1920, is limited in application to admiralty and maritime causes of action affecting the opera-

Reporter's Statement of the Case

tion of merchant vessels, and does not extend to a case where the owner of a vessel, citizen and resident of a foreign country, sues the United States for demurrage in connection with cargo consigned to it delayed in discharge at a foreign port, and the owner, because of the venue provisions and the fact that the vessel was never in an American port, could not have filed a libel in rem under the act.

The Reporter's statement of the case:

Mr. Wharton Poor for the plaintiff. *Mr. Frank J. Foley* and *Haight, Smith, Griffin & Deming* were on the briefs.

Mr. J. Frank Staley, with whom was *Mr. Charles F. Kincheloe*, for the defendant. *Messrs. Assistant Attorneys General Herman J. Galloway* and *Charles P. Sisson* were on the brief.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation organized and existing under the laws of the Kingdom of Sweden.

II. Under and by virtue of the laws of the Kingdom of Sweden, citizens of the United States are accorded the right to prosecute claims against the Kingdom of Sweden in its courts.

III. The plaintiff at all the times hereinafter mentioned was the owner of the SS. *Daland*, which said steamship had a carrying capacity of 3,850 deadweight tons, including bunkers.

IV. On December 17, 1918, the plaintiff, through its agents, Axel Brostrom & Son, entered into a charter party in writing with W. C. Bullock, acting on behalf of the French authorities, a copy of which is attached to plaintiff's petition and made a part hereof by reference.

V. Among the material provisions of the said charter party are the following:

"6. Cargo to be received by merchants at their risk and expense alongside the steamer not beyond the reach of her tackle and to be discharged as fast as the steamer can deliver according to the customs of the port.

"Time for discharge to commence to count 24 hours after the steamer's arrival at port or place in France and/or Great Britain where she may be ordered by the French authorities

and/or British authorities to await her discharging berth, but steaming time from such place of detention to berth of discharge not to count.

"7. Demurrage as per agreement between the British authorities and Sjofartskommitten.

"8. Owners have a lien on the goods for freight, dead freight, demurrage, and damages for detention."

VI. The agreement between the British authorities and Sjofartskommitten referred to in clause 7 of the said charter party fixed the demurrage rate at 1s. 3d. per day per deadweight ton, including bunkers, which amounted to £240 12s. 6d. per day.

VII. Prior to January, 1919, there was loaded on board the SS. *Daland*, at Gothenburg, Sweden, a full cargo of 2,175,038 kilos, consisting of sixteen shipments of matches, paper, and wood accepted from Trummer & Co. Shipments numbered six and seven in the manifest were consigned by Trummer & Co. to the chief quartermaster, American Expeditionary Forces, in France. The freight thereon was prepaid and the master issued bills of lading covering the said shipments which contained, among others, the following clause: "All other conditions as per charter party, dated Gothenburg, 17th of December, 1918." Copies of these bills of lading are attached to the petition, marked Exhibits C and D, and made a part hereof by reference.

VIII. The SS. *Daland* arrived at Havre Roads, France, at midnight on January 28, 1919, where she was ordered by the French authorities to wait for her discharging berth. Thereafter her movements were as follows: Left Havre Roads for Duclair, to which she had been ordered to shift, at 9.30 a. m. on February 4th, arriving at Duclair at 3.30 p. m. of the same day. Left Duclair for Rouen February 13th at 11 p. m., arriving there at 8 a. m. on the 14th. Thereafter she commenced to discharge, discharge being completed on March 8, 1919, at 8.30 a. m.

IX. Although the *Daland* would have been able to discharge at the rate of 500 tons per day had the cargo been taken away promptly, yet, according to the customs of the port of Rouen, she was not entitled to require a faster rate of discharge than 300 metric tons per day.

X. There were delivered to, and received by, the defendant shipments numbered six and seven on the manifest weighing 428,956 kilos.

XI. The computation of lay days and demurrage days is as follows:

By the charter party the time for discharge began to count twenty-four hours after the *Daland's* arrival at Havre Roads, i. e., at midnight, January 29, 1919.

As the rate for the discharge of the cargo of 2,175 tons was 300 tons per day, the time fixed for the discharge was seven days, six hours, to which should be added, in accordance with the charter party, fifteen hours' steaming time from Havre Roads to Rouen, and also Sunday, February 2nd, which did not count as a lay day under the custom. The lay days consequently expired at 9 p. m. on February 7, 1919.

The demurrage days began on February 7, 1919, at 9 p. m., and ended on the discharge of the cargo on March 8th, at 8.30 a. m., the period of demurrage being thus twenty-eight days, eleven and one-half hours, which at the stipulated rate of £240 12s. 6d. per day, amounted to £6,852 16s.

XII. Demand for the payment of demurrage was made by or on behalf of the plaintiff upon the consignees of the cargo and payment thereof was received except with respect to the cargo consigned and delivered to the defendant which constituted 428,956/2,175,038 of the total cargo on board. The proportional amount of demurrage chargeable against said cargo was £1,351 9s. 10d.

XIII. Demand for the payment of demurrage was made upon said quartermaster and the United States by the plaintiff herein and/or its agents, but said demand was refused.

XIV. The value of the said sum of £1,351 9s. 10d. in money of the United States on March 8, 1919, was $6,419.48.

The court decided that plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The sole issue in this case is one of jurisdiction. The plaintiff is a corporation organized and existing under the laws of the Kingdom of Sweden. It owned the steamship

Daland, a vessel of 3,850 deadweight tons, including bunkers. On December 17, 1918, it entered into a charter party with the French authorities for a voyage from Gothenburg, Sweden, to Rouen, France. The charter contained, among others, the following pertinent provisions:

"6. Cargo to be received by merchants at their risk and expense alongside the steamer not beyond the reach of her tackle and to be discharged as fast as the steamer can deliver according to the customs of the port.

"Time for discharge to commence to count 24 hours after the steamer's arrival at port or place in France and/or Great Britain where she may be ordered by the French authorities and/or British authorities to await her discharging berth, but steaming time from such place of detention to berth of discharge not to count.

"7. Demurrage as per agreement between the British authorities and Sjofartskommitten.

"8. Owners have a lien on the goods for freight, dead freight, demurrage, and damages for detention. Charterers remain responsible for dead freight and demurrage (including damages for detention) incurred at port of loading. With regard to freight and demurrage (including damages for detention) incurred at port of discharge, charterers also remain responsible but only to such extent that it has been impossible for owners to cover such claims by exercising the lien on the cargo."

Prior to sailing from Gothenburg the charterer accepted from Trummer & Company two shipments of matches, paper, and wood consigned to the chief quartermaster, American Expeditionary Forces in France. The terms of the bills of lading for said shipments concerning demurrage were in accord with and expressly adopted the terms of the charter party of December 17, 1918, quoted above. Demurrage accrued to the plaintiff as found by the court. (Findings VIII, IX, X, and XI.) The defendant concedes liability for the same. Right of recovery is challenged upon the theory that the suit is one governed by the suits-in-admiralty act of March 9, 1920 (41 Stat. 525), and this court is without jurisdiction to entertain it.

The plaintiff predicates its right of action upon sections 145 and 155 of the Judicial Code. Section 155 is in the following terms:

"Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction. (*36 Stat. L. 1139.*)"

The pertinent provisions of the suits-in-admiralty act we quote as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock, or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this act shall not apply to the Panama Railroad Company.

"SEC. 2. That in cases where if such vessel were privately-owned or operated, or if such cargo were privately-owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause

may, in the discretion of the court, be transferred to any other district court of the United States.

"SEC. 3. That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation heretofore given in admiralty causes by the United States, the United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation, shall become void and be surrendered and canceled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 8 of this Act.

* * * * *

"SEC. 5. That suits as herein authorized may be brought only on causes of action arising since April 6, 1917, provided that suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises."

The foregoing statute has been many times before the courts and usually upon issues of jurisdiction. Available cases do not as to facts cover the precise point here involved.

The defendant relies with confidence upon the case of *Eastern Transportation Co.* v. *United States*, 272 U. S. 675.

This case, followed by the case of *Johnson* v. *Fleet Corporation*, 280 U. S. 320, determines beyond doubt the lack of jurisdiction in this court to adjudicate controversies which fall within the facts therein involved. The instant case, however, presents a record of decidedly different character, both as to persons and subject matter, and in our opinion is not within the precedents cited by the defendant. The Supreme Court in repeated decisions has stated plainly the intent of Congress in enacting the suits-in-admiralty act and definitely defined its scope. Prior to the passage of the act the Supreme Court in the case of *The Lake Monroe*, 250 U. S. 246, had held that under the shipping act of 1916 and the merchant marine act of 1920 Government-owned merchant vessels were subject to admiralty and maritime proceedings the same as privately owned merchant vessels. To relieve the Government from the inconvenience of the arrest and detention of its merchant vessels operated by the Government, or the designated agencies thereof, express provisions were enacted, saving to the injured parties the right of action in admiralty, but divesting the plaintiffs of any and all right of lien against the vessel or cargo, or their arrest and detention. Manifestly Congress recognized that adverse decrees in admiralty against the Government or Fleet Corporation must be satisfied from the Treasury through appropriations for the purpose, and consented to be sued as the act provided in accord with its terms and provisions. The unhampered operation of the Government's merchant vessels was the intended objective. As said by the Supreme Court in *Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202, 213:

"It provides a remedy in admiralty for adjudicating and satisfying all maritime claims arising out of the possession or operation of merchant vessels of the United States and the corporations, in which the obligation of the United States is substituted for that of the corporations. To that end it furnishes a complete system of administration, applying to the United States and the corporations alike, by which uniformity is established as to venue, service of process, rules of decision and procedure, rate of interest, and periods of limitation; and not only provides that the judgments against

the corporations, as well as those against the United States, shall be paid out of money in the Treasury, but repeals the inconsistent provisions of all other acts.

"In view of these provisions of the Act we can not doubt that it was intended to furnish the exclusive remedy in admiralty against the United States and the corporations on all maritime causes of action arising out of the possession or operation of merchant vessels. And nothing in its legislative history indicates a different purpose.

"It follows that after the passage of the Act no libel in admiralty could be maintained against the United States or the corporations on such causes of action except in accordance with its provisions; * * *."

The decided cases uniformly limit the applicability of the suits-in-admiralty act to admiralty and maritime causes of action affecting the operation of the Government's *merchant vessels*. This, it seems to us, is the settled scope of the legislation. *Blamberg Bros.* v. *United States*, 260 U. S. 452. In *Fleet Corporation* v. *Rosenberg Bros.* (*supra*), page 214, the Supreme Court said:

"Whether in addition to furnishing an exclusive remedy in admiralty, the Act also prevents a resort to any concurrent remedies against the United States or the corporations on like causes of action in the Court of Claims or in courts of law, is a question not presented by these cases and upon which, although referred to in the argument, we express no opinion. And it is unnecessary to determine other contentions of the Fleet Corporation relating to the questions of deviation and laches."

And in *Johnson* v. *Fleet Corporation* (*supra*), page 327, it was said: "We conclude that the remedies given by the act are exclusive in all cases where a libel might be filed under it." We think it only necessary to assert that the plaintiff company could not have filed a libel under the act. The venue provisions and foreign residence of the corporation precluded recourse thereto. The vessel was never in an American port. In addition to this, the character of the transaction itself is such as to at least engender substantial doubt as to the intent of Congress to extend the right and remedy to cases like this. The Government engages transportation for war supplies from a foreign vessel owner, a simple contract of carriage, the merchandise being consigned to a foreign port beyond the jurisdiction of the defendant,

and where, of course, the suits-in-admiralty act is without force. It is a mere contract of affreightment accomplished by the plaintiff in accord with the terms of the bill of lading, in the entire course of which no merchant vessel of the United States is involved and no impelling reasons for the applicability of the suits-in-admiralty act.

Section 7 of the statute provided that, in the event of the seizure of a merchant vessel or cargo, of the Government in a foreign port, the Secretary of State may, in his discretion, upon the request of the Attorney General, direct the proper United States consul to claim immunity from such suit and seizure and to execute a bond on behalf of the United States for release of the vessel and cargo, and in the case of *Blamberg Bros.* (*supra*) the Supreme Court, at page 459, said:

"Congress had no power, however, to enact immunity from seizure in respect of such vessels when in foreign ports, and therefore the embarrassment of seizures was to be mitigated in another way, i. e., by claiming immunity on international grounds and, if that failed, by stipulation or bond in the name of the United States. The provisions of the seventh section confirm the construction by which provisions of the second section are limited in their application to vessels within the jurisdiction of the United States."

We do not overlook the fact that the plaintiff comes into the United States and asserts its claim under section 155 of the Code, and by so doing, if we are correct, obtains the right to do so for a statutory period of six years; nor are we unmindful of the provision in section 155 which limits our jurisdiction with respect to aliens to the precise limitations of section 145 of the Code. If, of course, the suits-in-admiralty act divests this court of jurisdiction over the involved subject matter, and leaves the plaintiff without a provided remedy, the defendant's position is invulnerable. As we apprehend the contentions, the defendant concedes our jurisdiction under section 145 if a libel may not be filed by the plaintiff under the suits-in-admiralty act. It is to be observed, however, that whatever advantages the plaintiff obtains, if such an argument is at all available, are minimized to the extent of the loss of interest and costs, items which we are precluded from making a part of our judgment.

We are not inclined to the opinion that it was the intent of Congress in enacting the suits-in-admiralty act to deny a nonresident alien recourse to this court in a case of this character, where, by the terms and provisions of the act, it was impossible for such a claimant to invoke its provisions. The failure to make provision for the assertion of claims by a nonresident alien in the district courts of the United States, whereas here the venue provisions of the act exclude the possibility of so doing, is not, we think, to be attributable to a legislative oversight, or an intent to withhold from claimants of this class all remedy for, as in this case, a conceded loss and injury. The importance of this case lies not only in this single claim but many others of a similar nature now pending.

Judgment for the plaintiff for $6,419.48. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge,* concur.

JAMES CARROLL BYRNES, JR., v. THE UNITED STATES.

[No. J-84. Decided June 2, 1930]

On the Proofs

Statutory construction.—The framers of a statute are presumed to intend that the words used be accorded their ordinary meaning and recognized legal significance.

Same; use of word "children."—Where the word "children" is used in a statute without limitation or qualification the word includes adopted children.

Rental and subsistence allowances; dependents; adopted children.—The word "children" as used in section 4 of the officers' pay act of June 10, 1922, defining those who are to be deemed "dependent" for the purpose of increased rental and subsistence allowances to officers of the Army, Navy, etc., includes legally adopted children.

The Reporter's statement of the case:

Mr. Christopher B. Garnett for the plaintiff.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant.

The court made special findings of fact, as follows:

I. James Carroll Byrnes, jr., is an officer of the United States Navy with rank of lieutenant commander, and has completed twenty years of service. His pay is determined by the pay of the "fourth period," as defined in the officers' pay act of June 10, 1922, ch. 212, 42 Stat. 625, as amended by act of May 31, 1924, ch. 224, sec. 2, 43 Stat. 250.

II. Plaintiff's sister, Sallie Byrnes Atkinson, was in 1918 deserted by her husband, Lawrence T. Atkinson, jr., leaving his wife and their infant child, Sarah Willoughby Atkinson, born March 16, 1916, without means of support. The said Sallie Byrnes Atkinson was in 1921 divorced from the bonds of matrimony with said Lawrence T. Atkinson, jr., and by the decree of divorce the exclusive custody and control of the infant child was given to plaintiff's sister.

III. Since February, 1920, plaintiff has been the sole support of his sister and her infant child, Sarah Willoughby Atkinson, due to the fact that her husband, Lawrence T. Atkinson, jr., has not since that time contributed in any way to their maintenance and support, and also to the fact that his sister, who has no independent means of support, developed a case of tuberculosis and has not been able to contribute to the support of herself and child.

IV. On the 25th day of July, 1922, the Supreme Court of the District of Columbia entered an order adjudging that plaintiff was a proper person to have the custody of the minor child, Sarah Willoughby Atkinson, and giving the plaintiff the privilege of adopting said minor child, and by said order the adoption by the plaintiff of said infant was legalized, and said infant was made an heir at law of the plaintiff as if she had been born to the plaintiff.

V. From the time of said adoption, to wit, July 25, 1922, until, to wit, December 1, 1927, plaintiff was awarded increased allowance, for the said Sarah Willoughby Atkinson, his adopted minor child. From December 1, 1927, until the present time, plaintiff has not been paid such increased allowance, due to the fact that the Comptroller General ruled that from December 1, 1927, increased allowances to officers for dependent adopted children would be disallowed in disbursing officer's accounts.

VI. If the plaintiff is entitled to the increased rental and subsistence allowance claimed by him as an officer with a dependent minor child, there is due him the sum of $263.20, the amount withheld from December 1, 1927, to February 29, 1928.

The court decided that plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

This is a suit by an officer of the United States Navy to recover the sum of $263.20, additional rental and subsistence allowance over that received by him, as such officer, for the period from December 1, 1927, to February 29, 1928.

There is no controversy as to the facts. The sole question for determination by the court being, whether a legally adopted minor child is a "dependent" within the meaning of the officers' pay act of June 10, 1922 (42 Stat. 625).

Section 4 of the said act provides as follows:

"That the term 'dependent' as used in the succeeding sections of this act shall include at all times and in all places a lawful wife and unmarried children under twenty-one years of age. It shall also include the mother of the officer provided she is in fact dependent on him for her chief support."

The plaintiff contends that the term "children" as used in section 4, aforesaid, includes a child legally adopted under section 395 of the District of Columbia Code (act of February 26, 1895) which reads as follows:

"That jurisdiction is hereby conferred on any judge of the supreme court of the District of Columbia to hear and determine any petition that may be presented by a person or a husband and wife residing in the District of Columbia, praying the privilege of adopting any minor child as his or her or their own child, and make such minor child an heir at law. If the judge shall find, upon the hearing of such petition, that the petitioner is a proper person to have custody of such child and that the parent or parents or guardian of such child have given their permission for such adoption, he shall enter an order upon the records of the court legalizing such adoption and making such child an heir at law of such petitioner the same as if such child was born to such petitioner. If the child has no parent or guardian, the judge shall appoint a guardian ad litem."

31623—31—C C—VOL. 70——19

Under the authority conferred by this act, the Supreme Court of the District of Columbia, on July 25, 1922, duly entered an order adjudging that the plaintiff was a proper person to have the custody of the minor child, Sarah Willoughby Atkinson, and by said order and decree the said minor child was legally adopted by the plaintiff and thereby became his heir at law, the same as if she had been born to the plaintiff.

At the time of the enactment of the officers' pay act in 1922, the laws of every State in the Union, as well as in the District of Columbia, provided for the adoption of minor children. While the statutes of the various States differ somewhat in their detailed provisions, their general effect is to fix the status of the adopted child to the adoptive parent as substantially the same as the status of a natural child and a natural parent. By the act of adoption the child becomes, in a legal sense, the child of the adoptive parent, and the relationship of the parties, their duties, rights, and legal obligation, one to the other, become the same as if such relationship had been created by nature.

Funk and Wagnall's Standard Dictionary, 13. Law, defines the word "adoption" to mean:

"'The legal act whereby an adult person takes a minor into the relation of a child, and thereby acquires the rights and incurs the responsibilities of a parent in respect to such minor.' N. Y. Stat. June 25, 1873, ch. 830."

"The child adopted under such an act becomes, for all legal purposes, the child of the person adopting it, and on the death of such person (intestate) will inherit as a child in preference to a nephew. 13 La. Ann. 516."

Where the word "child" or "children" has been used in a statute without qualification or limitation, the courts, both State and Federal, have uniformly held, so far as we have been able to find, that such term includes adopted as well as natural children.

The words "issue," "children," "kindred," and the like in statutes of descent and distribution, include adopted children, in the absence of anything indicating a contrary intent. 1 Corpus Juris 128, p. 1399, citing *Newman's Est.*, 75 Cal. 213; *In re Walworth*, 85 Vt. 322; *Riley* v. *Day*, 88 Kan. 503;

Gammons v. *Gammons*, 212 Mass. 454; *Gilliam* v. *Guaranty Trust Co.*, 186 N. Y. 127, 78 N. E. 697.

The Supreme Court of Kentucky held in construing a criminal statute, making the abandonment by a parent of a minor child a felony, that the statute included and was applicable to the abandonment of an adopted child by the adopting father. *Com.* v. *Kirk*, 212 Ky. 646.

The Supreme Court of Illinois construed the term "child" or "children" as used without qualification in the Police Pension Fund Act of that State, to include adopted children. *Ryan* v. *Foreman et al.*, 262 Ill. 175.

In *Ransom, Admr.*, v. *New York, Chicago & St. Louis Railway Co.*, 90 Ohio 223, the Supreme Court of Ohio construed the words "parents" and "children," in the Railroad Employees Liability Act of April 22, 1908 (35 U. S. Stat. c. 149), to include adopting parents and adopted children.

The court said:

> "It is quite evident that much depends upon the construction of the words 'parents' and 'children.' There is no limitation or qualification of the words under the Federal statute."

After quoting from the Ohio statutes, the court continued:

> "It will be observed here that the same words, 'parents' and 'children' are used without limitation or qualification as are used in the Federal statute.
>
> "Another Ohio statute, however, which may be known as the adopting statute of Ohio, reads as follows:
>
> "'SEC. 8029. When the foregoing provisions are complied with, if the court is satisfied * * *, it shall make an order setting forth the facts, and declaring that, from that date, to all legal intents and purposes, such child is the child of the petitioner, * * *'
>
> "Then follows section 8030, to the effect:
>
> "'* * * Such child shall be the child and legal heir of the person so adopting him or her, entitled to all the rights and privileges and subject to all obligations of a child of such person begotten in lawful wedlock.'
>
> * * * * *
>
> "These sections of the statutes (sections 8029 and 8030, General Code) are so plain and palpable that they need no construction. They are their own interpreters. Thousands of children who otherwise, through some misfortune deny-

Opinion of the Court

ing them proper natural parentage, have been by the law of the land, the adoption statutes, provided with comfortable homes and legal parents. Certainly, where statutes are so simple and so certain of their purpose and provisions as the statutes in question, no court should pervert or divert their terms so as to defeat the sound and wholesome public policy announced in these most humanitarian laws, providing as they do children for childless parents and parents for parentless children.

"When section 8029 provides that upon such adoption such child is the child of the adopters 'to all legal intents and purposes,' it is difficult to understand by what process of legal logic the rights shall be cut down or impaired from the rights it would have as a child born in lawful wedlock."

An adoptive parent is ordinarily liable for the support of an adopted minor child to the same extent as a natural parent would be liable, and the natural parent is relieved of responsibility. 1 Corpus Juris 1396, citing *Beach* v. *Bryan*, 155 Mo. A. 33, 133 S. W. 635; *Brown* v. *Welch*, 27 N. J. 429; *Moncrief* v. *Ely*, 19 Wend. (N. Y.) 405.

The word "children," used in the officers' pay act of 1922, is not limited or qualified in any way other than that they shall be unmarried and under twenty-one years of age. Congress used the word "children" without qualification or limitation, with full knowledge of the fact that the courts construed the word, when so used in other statutes, to include adopted children the same as natural children.

The framers of a statute are presumed to intend that the words used be accorded their ordinary meaning and recognized legal significance. To hold the word "children" as it appears in this statute does not include adopted children would be to give the word a restricted meaning, different from that in which it is commonly used and understood, and at variance with the construction consistently placed upon it by the courts.

The extra rental and subsistence allowance awarded officers under this statute is for dependents. An adopted child is dependent on its adoptive father morally and legally. He owes to it all the obligations and duties, including maintenance and education, he would owe to a natural child.

Syllabus

He is not only liable under the civil law for its support, but is liable to prosecution under the criminal law if he abandons it and refuses to furnish it proper support.

We have carefully examined the cases cited by the defendant and also the cases upon which the Comptroller General based his decision that the word "children" as used in the officers' pay act does not include adopted children. The facts in the cases cited are, we think, in each instance clearly distinguishable from the case at bar and are not in point on the question here presented. They do not announce a rule contrary to that heretofore stated, that where the word "children" is used in a statute without limitation or qualification the word includes adopted children.

The plaintiff is entitled to recover rental and subsistence allowance payable to an officer of his rank with an unmarried minor child for the period from December 1, 1927, to February 29, 1928, amounting to $263.20.

Judgment for that amount is awarded. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

HENRY P. WILLIAMS AND MARGARET A. WILLIAMS, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF GEORGE W. WILLIAMS, DECEASED *v.* THE UNITED STATES

[No. J-639. Decided June 2, 1930]

On the Proofs

Estate-transfer tax; life estate under trust deed; transfer by cestui que trust.—Where the decedent during his lifetime received a life interest in the use and income of property conveyed to him in trust the transfer so made was not by the decedent, within the meaning of sec. 402 (c), revenue act of 1921, imposing an estate-transfer tax in connection with transfers "intended to take effect in possession or enjoyment" at, or after death, nor was there a taxable transfer from the cestui que trust upon his death.

The Reporter's statement of the case:

Mr. Edmund B. Quiggle for the plaintiffs. *Mr. William M. Williams*, and *Williams, Myers & Quiggle* and *Buist & Buist* were on the brief.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. George W. Williams, a resident of Charleston, South Carolina, died April 27, 1923, leaving a last will and testament under which the plaintiffs herein were named as his executors. The plaintiffs qualified as executors and are still acting in that capacity.

II. On May 7, 1917, John H. Kohnke duly executed an instrument, a true copy of which is attached to the petition in this case as Exhibit "A" and by reference made a part of these findings, which instrument so far as pertinent to the question presented is as follows:

"*Know all men by these presents*, That I, John H. Kohnke, unmarried, in consideration of the sum of five dollars ($5.00) and other valuable consideration to me in hand paid, at and before the sealing and delivery of these presents, by George W. Williams, the elder, herein nominated as trustee, on the trusts hereafter set out (the receipt whereof is hereby acknowledged), have granted, bargained, sold and released, and by these presents do grant, bargain, sell, and release unto the said George W. Williams, the elder, as trustee, on the trusts hereafter set out:

"*To have and to hold*, the said premises with its rights, members, hereditaments and appurtenances, unto the said George W. Williams, the elder, as trustee, on the trusts hereafter set out, his heirs, successors in the Trust and assigns, forever, in *trust* to and for the following uses, intents, and purposes, that is to say: In trust for the joint use of the said George W. Williams, the elder, and Margaret A. Williams, his wife, for and during the term of their joint lives, the same not to be subject to the debts, contracts, or engagements of any present or future wife or husband of either of them and from and after the death of either the said George W. Williams, the elder, or the said Margaret A. Williams then in trust for the use of the survivor during the term of his or her natural life and from and after the

Reporter's Statement of the Case

death of the survivor then in trust for the lawfully begotten child or children of the said George W. Williams, the elder, who may be alive at the death of such survivor, share and share alike, freed and discharged from all further trusts, to them and their heirs and assigns forever, the child or children of any deceased child of the said George W. Williams, the elder, to take such share as his, her or their parent would have taken if alive.

"*And* I do hereby bind myself, my heirs, executors, and administrators, to warrant and forever defend all and singular the said premises above described (except that part thereof known as Cedar Island, to which I have hereby granted all my right, title, interest, and estate), unto the said George W. Williams, the elder, as trustee as aforesaid, his heirs, successors, and assigns, against me and my heirs, and all other persons whomsoever lawfully claiming or to claim the same or any part thereof."

III. April 4, 1924, the executors filed an estate-tax return for the estate of George W. Williams under the provisions of the revenue act of 1921 showing a net estate of $483,447.65 and an estate-tax liability of $15,506.86. This tax was paid April 28, 1924. On May 21, 1924, an additional amount of $1.75 was paid, making a total of $15,508.61. The return did not include as a part of the estate any value with respect to the lands conveyed by the deed of trust above mentioned dated May 7, 1917.

IV. In July, 1926, the Commissioner of Internal Revenue assessed an additional estate tax of $3,484.37 which was paid under written protest on July 31, 1926, upon demand of the collector.

V. On March 5, 1928, the executors filed a claim for refund of $3,526.74, representing a claimed overpayment of tax for the estate due to the inclusion as part of the taxable estate of $58,779.05 covering certain transfers of real estate and including the transfer made by the deed of trust of May 7, 1917, hereinbefore mentioned. June 25, 1928, the Commissioner of Internal Revenue rendered his decision allowing a claim for refund in the amount of $1,847.34 and disallowing it for the remainder, or $1,679.40, and issued a certificate of overassessment accordingly. Thereafter, on July 3, 1928, plaintiffs received Treasury check for the amount of overpayment together with $197.61, interest

thereon. The partial allowance of the claim for refund was due to the exclusion from the estate of the decedent of $30,789.03 representing transfers other than the said transfer of May 7, 1917. The rejection of the claim in the amount of $1,679.40 was due to the inclusion as a part of the taxable estate of the amount of $27,990.02 on account of the transfer of May 7, 1917.

The court decided that plaintiffs were entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The questions presented are (1) whether the transfer of May 7, 1917, from John H. Kohnke to the decedent as trustee for himself and his wife was such a transfer intended to take effect in possession or enjoyment at or after the decedent's death as may be included in the decedent's gross estate within the meaning of section 402 (c) of the revenue act of 1921, and, if so, (2) whether the taxation of an amount representing the transfer as a part of the estate of the decedent by the revenue act of 1921, which was passed more than four years after the transfer was made, is constitutional.

Section 402 (c) of the revenue act of 1921, 42 Stat. 227, provides:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act) * * *."

The plaintiffs contend, first, that the tax in question was wrongfully exacted for the reason that the statute under which it was collected applies only to interests "of which the *decedent* has at any time made a transfer, or with respect to which he has at any time created a trust," and that inasmuch as the instrument in question which made the transfer and created the trust was made by John H. Kohnke and not by the decedent, there was no authority for the inclusion of any

amount in respect thereof in the decedent's gross estate; secondly, that irrespective of whether the transfer was made by the decedent within the meaning of the statute it was not intended to take effect in possession or enjoyment at or after the decedent's death; and, thirdly, that if it be held that the transfer was one made by the decedent and intended to take effect at or after death, the revenue act of 1921 is unconstitutional under *Nichols* v. *Coolidge*, 274 U. S. 531, to the extent that it taxes retroactively as a part of the decedent's gross estate the interest so transferred.

We think plaintiffs must prevail upon the first point. The transfer of the property and the creation of the trust in respect thereof were the act of John H. Kohnke. On this point the defendant states "that the transfer from Kohnke to George W. Williams, as trustee, was for consideration paid by the latter, and the trust so recites. The situation, therefore, is no different than it would be had the land been conveyed in fee to Williams and the trust then established by the latter. The decedent, Williams, merely took a short cut *but he was the founder of the trust*." This defense might carry some weight if there were sufficient facts to support it. But, before we can hold that the trust was one created by the decedent or that the creation thereof by Kohnke was "a short cut" and that the decedent was the founder of the trust, we must have sufficient facts clearly to establish this. All we know is that John H. Kohnke for a consideration of $5 in cash and "other valuable consideration" created a trust in favor of the decedent and his wife. This he had a perfect right to do and without more we can not say that the decedent created the trust. Plaintiff has overcome the *prima facie* correctness of the commissioner's assessment.

On any other theory we think the exaction of a tax by the inclusion of the value of any portion of this property in the gross estate of Williams would also be unauthorized. The transfer was complete and beyond recall when made in May, 1917, more than four years before the passage of the revenue act of 1921. It is unimportant that the decedent had a life interest in the use and the income of the property. The *cestui que trust* took under the terms of the trust instrument. There was no transfer from Williams by death.

Nichols v. *Coolidge*, 274 U. S. 531. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. *May, et al., Executors*, v. *Heiner*, 281 U. S. 238, decided April 14, 1930. In *Reinecke, supra*, the court held that the value of certain property in respect of which the decedent had created certain trusts, reserving to himself the life interest in the income and the management of the property, should not be included as a part of the estate subject to tax. In that case the trusts were created in 1919 and the grantor died in 1922.

Plaintiffs are entitled to recover one thousand six hundred seventy-nine dollars and forty cents ($1,679.40) with interest thereon from July 31, 1926, to such date as the commissioner may determine in accordance with the provisions of subsection (b), section 177 of the Judicial Code, as amended by section 615 of the revenue act of 1928, for which judgment will be accordingly entered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

BOSTON PRESSED METAL CO. v. THE UNITED STATES[1]

[No. K-99. Decided June 2, 1930]

On the Proofs

Income and profits tax; assessment within statutory period; claim in abatement; collection after period. See *Oak Worsted Mills* v. *United States*, 68 C. Cls. 539; *Gotham Can Co.* v. *United States*, 68 C. Cls. 749.

Same; sec. 609, revenue act of 1928; credit against liability.—Where under section 611 of the revenue act of 1928 a collection made after the expiration of the period of limitations is not to be considered an overpayment under section 607, section 609 (a), which provides that "any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607" does not make void a credit against the amount which, if collected, would under section 611 not be considered an overpayment.

---

[1] Certiorari applied for.

Reporter's Statement of the Case

The Reporter's statement of the case:

Mr. Harry Friedman for the plaintiff.

Mr. Charles R. Pollard, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant. *Messrs. Charles F. Kincheloe* and *Jeff T. Jones* were on the brief.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation, and on March 30, 1918, filed an income and profits tax return for the calendar year 1917, and paid the same during 1918. In December, 1919, the commissioner made an additional assessment, which was paid; and a further additional assessment on January 7, 1921, in the amount of $6,277.77, upon which on June 5, 1925, there was a balance owing on the tax of 1917 of $3,844.94.

On June 16, 1919, plaintiff filed an income and profits tax return for the calendar year 1918 disclosing a tax of $30,532.27, and paid the same during 1919, the last installment being paid on December 17, 1919. On January 7, 1921, the commissioner made an additional assessment against the plaintiff for the year 1918 of $13,299.65.

II. A claim for refund for $19,455.86 was filed by plaintiff on May 22, 1920. A claim for abatement for the sum of $19,577.42 (being $6,277.77 for the 1917 period and $13,299.65 for the 1918 period) was filed by plaintiff on February 24, 1921; on the same date a claim for refund for $5,938.11 was filed. On March 15, 1921, plaintiff filed a claim for a credit for the sum of $5,938.11. All of these claims were rejected in full by the commissioner on August 20, 1924.

On March 3, 1924, plaintiff filed a claim for refund for $25,000 for the year 1918. On August 27, 1924, the commissioner allowed the claim in the sum of $22,530.14 and rejected it for the balance of $2,469.86, and made a certificate of overassessment accordingly.

III. On January 7, 1925, the sum of $13,299.65 was abated on the additional assessment for 1918; $5,385.55 was applied as a credit against the additional tax of that amount for

the year 1920; and $3,844.94, the amount now in suit, was credited by the collector against the unpaid additional assessment for the year 1917.

IV. On March 12, 1925, plaintiff filed a claim for refund in the sum of $22,530.14 for the year 1918. This claim was rejected by the commissioner on July 23, 1925.

V. On July 14, 1928, plaintiff filed a claim for refund for $6,277.77, as well as $2,432.83 paid by plaintiff on June 5, 1925, which includes the amount of $3,844.94 now in suit, upon the ground that the tax was collected after the statutory period in which collection could legally be made had expired. The commissioner rejected this claim.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This is an action to recover taxes on the ground that they were paid after the expiration of the period of limitations.

The plaintiff filed its Federal income tax return for the year 1917 on March 30, 1918. An additional assessment for said year was made in December, 1919, and a further additional assessment on January 7, 1921, in the amount of $6,277.77. A claim for the abatement of said tax in the sum last mentioned was filed February 24, 1921, which was rejected in full on August 20, 1924. Of this amount plaintiff paid in cash $2,432.83 on June 5, 1925, leaving a balance owing for said year in the amount of $3,844.94.

The plaintiff filed its income tax return for 1918 on June 16, 1919, disclosing a tax of $30,532.27. This tax was paid in installments, the last payment being made on December 17, 1919. An additional assessment for said year was made on January 7, 1921, in the amount of $13,299.65. A claim for the abatement of said additional tax in the same amount was filed on February 24, 1921, and rejected August 20, 1924. On March 3, 1924, plaintiff filed a claim for refund for $25,000 for the year 1918. This claim on August 27, 1924, was rejected in the amount of $2,469.86 and allowed for $22,530.14. This allowance of $22,530.14 upon the claim for refund was applied by the collector as follows:

Opinion of the Court

$13,299.65 to the unpaid additional assessment for the year 1918, above referred to; $5,385.55 as a credit against an additional tax for the year 1920; and $3,844.94 was credited January 7, 1925, against the unpaid additional assessment for the year 1917. It will be observed in connection with this last credit that it was made after the statute of limitations had expired with reference to the taxes of 1917, but before the passage of the 1926 revenue act, and it is for this amount and on account of its application after the expiration of the period of limitations that plaintiff brings this suit.

We have heretofore held in the case of *Oak Worsted Mills* v. *United States*, 68 C. Cls. 539, upon similar facts, that where a tax has been assessed in time, a plea in abatement has been filed, the collection of the tax stayed, the plea in abatement determined, and the amount found to be due collected, there can be no recovery of the amount so collected, notwithstanding the collection was made after the period of limitations for the collection of the tax had expired. This holding was based upon sections 607 and 611 of the revenue act of 1928. See *Oak Worsted Mills* v. *United States*, *supra*; *Gotham Can Co.* v. *United States*, 68 C. Cls. 749; and *Mascot Oil Co.* v. *United States*, No. K–67, decided June 2, 1930. [*Ante*, p. 246.] It is contended on behalf of plaintiff that this case differs from those cases in that the amount which is sought to be recovered was collected by taking it out of a refund allowed and crediting it upon a tax for a previous year as to which the limitation for collection had expired, and that the amount so credited can be recovered under the provisions of section 609 (a) of the revenue act of 1928, which reads as follows:

"SEC. 609. *Erroneous credits.*—(a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607."

We do not think this contention is well founded, but consider it clear that under the express language of section 609 the credit is treated as a "payment in respect of such liability" against which ("against the liability") the credit

is taken. When the collector applied part of the money, which was due on the refund, to another tax, the relation of plaintiff and defendant to the transaction so far as this question is concerned was in law the same as if the collector had received cash from the plaintiff; and by the express language of section 609 the question of whether it is to be considered an overpayment, and hence recoverable, is to be determined under section 607, which in turn under its provisions depends on section 611. We therefore consider the question involved in the case at bar the same as that heretofore decided in the cases cited.

It follows that plaintiff's petition must be dismissed, and it is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

PENNSYLVANIA RAILROAD CO. v. THE UNITED STATES

[No. J-196. Decided June 2, 1930]

On the Proofs

Freight transportation; classification of paper bandages.—Crêpe paper bandage for surgical dressing, transported by plaintiff at the request of the Government, *held* to be properly classified as a "surgical bandage" and subject to freight rates accordingly.

Same; classification according to use.—Where an article transported by a common carrier may according to its general use be given a specific classification under the carrier's tariffs, it is not to be given another and a different rating merely because it may be available for another use.

Same; representation by manufacturer.—The description given by the manufacturer of an article in advertising it to the public gives the carrier the right to freight charges based upon the description so given.

The Reporter's statement of the case:

Mr. R. Aubrey Bogley for the plaintiff. *Messrs. Frederic D. McKenney, John S. Flannery*, and *G. Bowdoin Craighill* were on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation engaged in interstate commerce as a common carrier of passengers and freight for hire, duly organized and existing under the laws of the State of Pennsylvania.

II. During the month of April, in the year 1922, plaintiff, in conjunction with other common carriers, at the instance and request of Lieutenant F. J. McCormack, Quartermaster Corps, United States Army, transported on Government bills of lading, from Atlanta, Georgia, to Perryville, Maryland, seven shipments of crêpe paper bandages for surgical dressings, hereinafter referred to as bandages, property of the United States, consigned to the United States Public Health Service at Perryville, Maryland, where all of said shipments were delivered by plaintiff to and received by the United States Public Health Service. As the last carrier of said shipments and the party entitled to be paid for the transportation charges thereon, plaintiff rendered to the Treasury Department of the United States, at Washington, District of Columbia, its bills numbered 9275136 and 9275221, covering the transportation charges on said shipments, totalling $3,469.70, based upon a rate of $2.035 per hundredweight, being the prescribed rate in legally published tariffs on file with the Interstate Commerce Commission for the transportation of "surgical bandages or antiseptic gauze, in boxes."

III. From plaintiff's bill No. 9275136, claiming freight charges on five of the seven shipments of bandages, totaling $2,519.35, the Comptroller General of the United States, under settlement No. T–46919, dated October 12, 1922, disallowed the sum of $1,626.25 and paid plaintiff thereon in the sum of $893.10. From plainiff's bill No. 9275221, claiming freight charges on the remaining two shipments of bandages, totaling $950.35, the Comptroller General of the United States, under settlement No. T–45338, dated August 15, 1922, disallowed the sum of $617.85, and paid the plaintiff thereon in the sum of $332.50. These disallowances were

based upon the application by the Comptroller General of the United States of the rate of 66½ cents per hundredweight, being the prescribed rate in certain legally published tariffs on file with the Interstate Commerce Commission for the transportation of "toilet paper, paper toweling, or paper towels."

IV. Upon reconsideration of the foregoing settlements at plaintiff's request, the Comptroller General of the United States made a further payment to the plaintiff on said bill No. 9275136, under settlement Nos. T–79181–T and T–83946–T, dated June 20, 1925, and November 23, 1925, respectively, in the sum of $861.53, leaving a balance claimed by plaintiff on its original bill of $764.72, and a further payment on said bill No. 9275221, under settlement No. T–79077–T, dated June 16, 1925, in the sum of $379.99, leaving a balance claimed by plaintiff on its original bill of $237.86. These additional payments were based upon the application by the Comptroller General of the United States of the rate of $1.555 per hundredweight on less-than-carload shipments and $1.085 per hundredweight on carload shipments, being the prescribed rate in certain legally published tariffs on file with the Interstate Commerce Commission for the transportation of "paper N. O. I. B. N. [not otherwise indexed by name], not printed nor imprinted, in boxes, bundles, crates or rolls." Further payments on account of said bills have been demanded of and refused by the Comptroller General.

V. The specific shipments referred to in Finding II hereof, bill numbers, freight bill numbers, dates of shipment and delivery, car initials and numbers, bill of lading numbers, weights, freight charges based upon the rate of $2.035 per hundredweight, amounts allowed by Comptroller General and balance claimed by plaintiff on original bills, are set forth in the statement, marked "Exhibit A," attached to the petition filed herein, which statement by reference is made a part hereof.

VI. Said shipments consisted of rolls of crêpe paper, three and one-half inches wide and forty-five feet long, packed in boxes, a true sample of which is filed as plaintiff's Exhibit No. 2 in this cause and made a part hereof by reference.

Reporter's Statement of the Case

This article, which was manufactured by the Dennison Manufacturing Company of Framingham, Massachusetts, was described by said manufacturer as "Dennison's crêpe paper bandage for surgical dressing," and was for use in holding in place dressings on wounds. The wrapper which accompanied each roll contained the following words and inscriptions:

"DENNISON'S CRÊPE PAPER BANDAGE FOR SURGICAL DRESSING

"No. 23½. 45 feet long, 3½ inches wide

"*Directions*

"The loose gummed strip enclosed is to be used for sealing the bandage after it is applied and any unused part may be utilized in refastening the remaining portion of the bandage to prevent unrolling.

"*Important*

"These bandages can be used to hold dressings on wounds but must not be used directly over the wound. They are most useful in cases where the wounded part is at rest, such as hospital cases, bed cases, etc.

"DENNISON MANUFACTURING CO.,
"*The Tag Makers, Framingham, Mass., U. S. A.*"

VII. At the time said shipments moved there were on file with the Interstate Commerce Commission tariffs relating to the transportation here in question providing (1) a rate of $2.035 per hundredweight, any quantity, on articles therein described as "Surgical bandages or antiseptic gauze, in boxes"; (2) the same rate, any quantity, on commodity therein described as "paper, crêpe, in boxes"; and (3) a rate of $1.085 per hundredweight on carloads, minimum weight 36,000 pounds, and $1.555 per hundredweight, less than carload, applying on commodity therein described as "paper, N. O. I. B. N., not printed nor imprinted, in boxes, bundles, crates, or rolls." The abbreviation "N. O. I. B. N.," under the terms of said tariffs, meant "not otherwise indexed by name," and the said rates so carried as applying to "paper, N. O. I. B. N., not printed nor imprinted, in boxes,

bundles, crates, or rolls," could not, under said terms, be applied to aforesaid transportation if the articles transported were properly described as "paper, not printed nor imprinted," but nevertheless were otherwise indexed by name in Consolidated Freight Classification Tariff No. 2, which is filed as plaintiff's Exhibit No. 4, and is made part hereof by reference.

The court decided that plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

In the month of April, 1922, the plaintiff railroad company, in conjunction with other carriers, transported for the Government, in accord with Government bills of lading, seven shipments of crêpe paper bandages for surgical dressings. The shipments originated at Atlanta, Georgia, and were consigned to the United States Public Health Service, Perryville, Maryland. The facts are not in dispute.

The plaintiff company presented its transportation bills for a total sum of $3,469.70 based upon a rate of $2.035 per hundredweight. When the shipments were accomplished there were no tariffs on file with the Interstate Commerce Commission providing a rate on "crêpe paper bandage for surgical dressing," by that name. There were, however, on file with the commission tariffs providing class rates between the point of origin and destination, applicable to this movement as follows:

"Surgical bandages or antiseptic gauze, in boxes," first-class rate any quantity, $2.035 per hundredweight.

"Paper, crêpe, in boxes," first-class rate any quantity, $2.035 per hundredweight.

"Paper, N. O. I. B. N. [not otherwise indexed by name] not printed nor imprinted, in boxes, bundles, crates, or rolls," third-class rate less than carload $1.555 per hundredweight, and fifth-class rate carload, $1.085 per hundredweight.

The plaintiff company's bills were predicated upon a classification of the commodity carried as coming within either the first or second paragraph of the above tariffs. The Comptroller General declined to approve the bills as presented. The first deduction from the amount claimed

Opinion of the Court

was based upon a claimed classification of the shipment as falling within the tariffs on file with the commission providing a rate of 66½ cents per cwt. for the transportation of "toilet paper, paper toweling, and paper towels." Subsequently, upon a reconsideration of the claim of the plaintiff company, the Comptroller General reversed in part his ruling, allowed some additional sums, and finally classified the shipment under the tariffs on file, which provide a rate for the transportation of "paper, N. O. I. B. N." (not otherwise indexed by name). As a result of the final action of the comptroller, the plaintiff's original claim was reduced to the extent of $1,002.58. This suit is for the recovery of that sum.

The consolidated freight classification to which recourse must be had in this instance contains class ratings on articles of all descriptions, and the single issue in the case is the ascertainment of a proper classification for the article involved. If the specific article shipped is devoid of features, character, and use which entitle it to be classified as the manufacturers of the article classified it, and possesses no characteristics which bring it within the specific classification contained in the Consolidated Freight Classification, then, of course, it falls within the comprehensive and general classification, "N. O. I. B. N." The facts, as well as physical exhibit of the article, leave no room for doubt that the same was manufactured and intended for use as a paper bandage for surgical dressing. The defendant makes much of the fact that the paper is not medicated and is not to be applied directly to a wound. This is true, and from the record is the sole defense available, as the defendant produced no testimony. The plaintiff, on the other hand, produced three disinterested witnesses, each an undisputed expert of long experience in freight classification, and without exception the proof establishes that the article involved is a surgical bandage. The fact that it is made of paper and serves to hold the dressing on wounds in place, "which is the common use of the cloth bandage" as well as all others, does not change its identity. There is nothing in the record to disprove the above proven facts, and it may not be disputed that both in form and in substance the article is intended

as a surgical dressing and nothing else. Of course it could be used for other purposes, but its *availability* for use is not always determinative. (*Ford Co.* v. *Railroads*, 19 I. C. C. 507.) Its use, however, as disclosed by the experts, becomes a useful factor in determining its identity, and the intended use of articles as disclosed by the consolidated classification for rates indicates by innumerable descriptive terms that the applied ratings originate from variations in use. (*W. Scheidel & Co.* v. *Railroads*, 11 I. C. C. 532.)

We might prolong the discussion by extending this opinion to various other contentions contained in the briefs. It is sufficient, we think, from the findings, to say that the article transported is a surgical bandage. It was transported to the Public Health Service, manufactured as an inexpensive bandage, for use as directed, and unquestionably adapted for that use. The Interstate Commerce Commission in the early case of *Andrews Soap Co.* v. *Railroads*, 4 I. C. C. 41, a case cited in plaintiff's brief, disposed of a classification case, and in so doing decided as follows:

"In this case, if the soap of the complainant, which is represented as a toilet soap, is in fact of no greater value or cost of production than the common soap with which it comes in competition, the discrimination complained of in respect to the classification and rate could readily be obviated by putting it on the market and having it transported as a common or laundry soap.

* * * * *

"The commission is unable to see how it can properly or justly require carriers to analyze the freight offered to them, to ascertain its quality and its actual value, when those are claimed to differ from its trade designation and the price paid by the consumer. A rule of that kind would be altogether impracticable.

* * * * *

"When a manufacturer describes his article to the public for the purpose of making a market for it, he also so describes it for purposes of carriage, and it seems as reasonable that the carrier should have the right to accept the manufacturer's representation concerning his product as that the public should be influenced by it in the purchase of the article."

The plaintiff is awarded a judgment for $1,002.58. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge,* concur.

WARREN TOOL & FORGE CO. v. THE UNITED STATES

[No. J–183. Decided June 2, 1930]

On the Proofs

Income and profits tax; tentative return for 1918; commencement of statutory period of limitation.—The tentative return permitted by the Commissioner of Internal Revenue for 1918 taxes was not the return required by law and did not start the running of the statute of limitations as to collection. See *Oak Worsted Mills* v. *United States*, 68 C. Cls. 539.

The Reporter's statement of the case:

Mr. Harry S. Hall for the plaintiff.

Mr. George H. Foster, with whom was *Mr. Charles F. Kincheloe*, for the defendant. *Mr. Assistant Attorney General Herman J. Galloway* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff is an Ohio corporation, with situs and place of business in the city of Warren, county of Trumbull, State of Ohio, and was such corporation during the entire calendar and taxable year 1918, the year involved in this proceeding. The plaintiff is engaged in the manufacture of picks, mattocks, sledges, and related commodities and was so engaged during the entire calendar and taxable year 1918.

II. Under the provisions of the act of Congress approved February 24, 1919, entitled "An act to provide revenue and for other purposes," otherwise generally known as the revenue act of 1918, plaintiff on the 15th day of March, 1919, filed a return on Form 1031T, commonly known as a "Tentative return and estimate of corporation income and profits

taxes and request for extension of time for filing return." On June 16, 1919, the plaintiff filed its completed return for the calendar year 1918, on Form 1120, known as "Corporation income and profits tax return for calendar year 1918." An amended return for the calendar year 1918 was filed by the plaintiff on October 14, 1919.

III. On the June, 1921, list, page 95, line 9, the Commissioner of Internal Revenue assessed an additional tax against plaintiff in the amount of $80,132.52 for the calendar year 1918.

IV. On or about September 7, 1921, the plaintiff filed a claim for abatement asking for the abatement of the amount $80,132.52, alleging as the ground for the abatement of this additional tax of $80,132.52, the right of the plaintiff to have its war-profits and excess-profits tax for the year 1918 determined strictly in accordance with the manner provided by sections 327 and 328 of the revenue act of 1918. The tax collector thereupon took no steps to collect the assessment pending the determination of the claim for abatement. On February 5, 1923, plaintiff filed with the Commissioner of Internal Revenue a formal application for assessment and determination of its profits tax under the provisions of sections 327 and 328 of the revenue act of 1918. On September 22, 1924, the Commissioner of Internal Revenue allowed this application, which also was the allowance in part of the claim for abatement, resulting in the reduction of the additional tax from $80,132.52 to the sum of $33,314.54. Of this $33,314.54, a credit thereto in the amount of $11,604.55 was applied on May 17, 1923, by the collector of internal revenue, and the taxpayer on June 12, 1925, paid the sum of $21,709.99 to said collector of internal revenue.

V. On April 27, 1927, plaintiff filed with the Commissioner of Internal Revenue a claim for refund for $33,314.54, plus interest paid by it to the collector of internal revenue as aforesaid, upon the following grounds:

(1) That the alleged tax was erroneous, excessive, and illegal.

(2) That the collection of said alleged tax was barred at the time of payment by the tolling of the statute of limitations, for the following reasons, to wit:

(a) That payment was exacted more than five years after the return was filed.

(b) That no suit or proceeding was instituted within the five-year period.

(c) That the return was not false or fraudulent, neither had the Commissioner of Internal Revenue nor plaintiff consented in writing to a later determination, assessment, and collection of the tax.

(3) By reason of the expiration of the statute of limitations applicable, not only was the procedure for its collection barred, but the right, if any, of the Government to the alleged tax itself was and is extinguished.

VI. On the 11th day of February, 1928, the Commissioner of Internal Revenue denied the foregoing claim for refund.

VII. The plaintiff on or about February 21, 1924, filed a waiver in which it consented to an assessment and collection of the amount of income, excess-profits, or war-profits tax due under any return made by it for the year 1918 within a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the bureau, within which assessments of taxes might be made for the year mentioned.

VIII. Plaintiff relies upon the revenue acts of 1916, 1917, 1918, 1921, 1924, 1926, and all amendments thereto and sections thereof that are or may become applicable to the facts of its case, and more especially on subsection (d) of section 250 of the revenue act of 1918; subsection (e) of section 278 of the revenue act of 1924.

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff sues to recover the sum of $33,314.54, an alleged overpayment of its income and profits taxes for the calendar year 1918.

On March 15, 1919, the plaintiff filed what is commonly known as a "Tentative return and estimate of corporation income and profits taxes and request for extension of time for filing return for the year 1918."

On June 16, 1919, the plaintiff filed its completed return for the calendar year 1918, on Form 1120, known as "Income and profits tax return for calendar year 1918."

In June, 1921, the Commissioner of Internal Revenue assessed an additional tax against the plaintiff in the amount of $80,132.52.

On September 7, 1921, the plaintiff filed its claim for abatement asking for the abatement of the amount of the additional taxes assessed against it, alleging as a ground therefor the right of the plaintiff to have its war-profits and excess-profits taxes for the year 1918 determined under the provisions of sections 327 and 328 of the revenue act of 1918.

The commissioner on September 22, 1924, allowed the plaintiff's application for special assessment and reduced the plaintiff's additional taxes from the sum of $80,132.52, to $33,314.54, and abated its taxes in the sum of $46,817.98. Of the amount of the additional sum thus determined a credit for the sum of $11,604.55 was applied and the balance, $21,709.99, was on June 12, 1925, paid to the collector of internal revenue by the plaintiff.

The plaintiff on April 27, 1927, filed with the Commissioner of Internal Revenue a claim for refund of $33,314.54, plus interest paid by it, upon the following grounds:

(1) That the alleged tax was erroneous, excessive, and illegal.

(2) That the collection of said alleged tax was barred at the time of payment by the tolling of the statute of limitations, for the following reasons, to wit:

(a) That payment was exacted more than five years after the return was filed.

(b) That no suit or proceeding was instituted within the five-year period.

(c) That the return was not false or fraudulent, neither had the Commissioner of Internal Revenue nor plaintiff consented in writing to a later determination, assessment, and collection of the tax.

(3) By reason of the expiration of the statute of limitations applicable, not only was the procedure for its collection barred, but the right, if any, of the Government to the alleged tax itself was and is extinguished.

The provisions of law fixing a limitation upon the assessment and collection of income and profits taxes are as follows:

Subsection (d) of section 250 of the revenue act of 1918 provides:

"Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made * * *."

Subsection (a) of section 227 of the revenue act of 1921 provides:

"That returns (except in the case of nonresident aliens) shall be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the fifteenth day of March. * * *"

Subsection (d) of section 250 of the 1921 act provides:

"The amount of income, excess-profits, or war-profits taxes due under any return made under this act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this act for prior taxable years or under prior income, excess-profits, or war-profits tax acts, or under section 38 of the act entitled 'An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this act or under prior income, excess-profits, or war-profits tax acts, or of any taxes due under section 38 of such act of August 5, 1909, shall be begun after the expiration of five years after the date when such return was filed. * * *"

The case turns entirely on the questions of whether the statute of limitations against the assessment and collection of the taxes in question commenced to run from March 15,

Syllabus

1919, the date of the filing of the tentative return, as contended by the plaintiff, or from June 16, 1919, the date of the filing of the formal or completed return as contended by the defendant.

Since the case was submitted the Supreme Court in *White, Collector*, v. *Hood Rubber Company*, decided February 24, 1930 [280 U. S. 453], has passed directly on the question and held that the statute begins to run from the date of the filing of the completed return. Under the revenue acts of 1918 and 1921, the assessment and collection of plaintiff's income and profits taxes for the year 1918 are required to be made within five years after the filing of the return by the taxpayer. In this case the five-year period was extended an additional year by reason of the waiver, fixing the period within which the commissioner was authorized to make the assessment and collection of plaintiff's 1918 income and profits taxes to June 16, 1925.

The taxes were assessed and collected within the required period and were therefore properly and legally assessed and collected.

The plaintiff's petition is dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

GEORGE U. HIND v. THE UNITED STATES

[No. J-685. Decided June 2, 1930]

On the Proofs

Refund of income tax; interest; allowance of refund prior to revenue act of 1926; payment thereafter; section 1116.—Where the Commissioner of Internal Revenue approved a schedule of refunds before the revenue act of 1926 went into effect, sent to him by a collector, but the refund in question was not paid by the disbursing clerk until after the act went into effect, section 1116, restricting interest to the first date on which the commissioner signs the schedule of overassessments, applies, in view of paragraph (c) making the section "applicable to any refund paid, and to any credit taken, on or after the date of the enactment of this Act, even though such refund or credit was allowed prior to such date."

Same; right to interest.—The allowance to a taxpayer of interest on a refund is a matter of grace with the sovereign, and except as given by Congress the taxpayer has no right thereto which can not be withdrawn or modified at any time.

The Reporter's statement of the case:

Mr. George E. H. Goodner for the plaintiff. *Mr. Paul D. Banning* was on the brief.

Mr. Charles R. Pollard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Ralph E. Smith* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff, a resident of California, filed a tentative income-tax return for 1918 on March 14, 1919, showing an estimated tax of $150,000. No assessment was made on this return. June 14, 1919, he filed a complete return for 1918 showing a tax of $144,009.04 which was paid in four installments of $37,500 on March 14, 1919, $34,504.52 on June 14, 1919, and $36,002.26 each on September 13 and December 13, 1919.

II. March 10, 1920, he filed his tax return for 1919 showing a tax of $87,547.07, $65,660.31 of which was paid in three equal installments of $21,886.77 on March 10, June 14, and September 15, 1920, leaving an unpaid balance of $21,886.76.

III. February 28, 1923, plaintiff filed amended returns for 1918 and 1919 in which he claimed that the correct tax for 1918 was $20,833.12 and for 1919 $6,641.73. No assessment was made on these amended returns. At the time these returns were filed plaintiff also filed claim for refund of $123,175.92 for 1918 and a composite claim for the abatement of $21,886.76 and a refund of $59,018.58 for 1919.

IV. In July, 1923, the commissioner made an additional assessment of $105.40 for 1919 against the plaintiff which amount was paid October 2, 1923.

V. Upon examination and audit of the returns for 1918 and 1919 the Commissioner of Internal Revenue determined overassessments of $76,167.50 for 1918 and $76,487.96 for 1919, and on October 15, 1925, he approved a schedule of

overassessments designated as Schedule IT: A: 15790, Form 7805, which embraced overassessments in favor of plaintiff in the amounts stated. This schedule was transmitted to the collector for his action in accordance with the directions appearing thereon. He complied and on October 29, 1925, signed and returned the schedule to the commissioner together with a schedule of refunds and credits designated as Schedule IT: R: 15790, Form 7805–A.

VI. December 2, 1925, the commissioner approved the schedule of refunds and credits and authorized the disbursing clerk of the Treasury Department to issue checks for the amounts found to be refundable.

VII. Interest has been allowed and paid on the overpayments for 1918 and 1919 from the dates on which the overpayments were made to October 15, 1925, the first date on which the Commissioner of Internal Revenue signed the schedule of overassessments for transmission to the collector, as follows:

Year	Amount of overassessment	Amount abated	Amount refunded	Interest allowed		Interest
				From—	To—	
1918	$76, 167. 50		$36, 002. 26 36, 002. 26 4, 162. 98	12/13/19 9/13/19 6/14/19	10/15/25 10/15/25 10/15/25	$12, 612. 62 13, 152. 66 1, 582. 62
Total interest allowed for 1918						27, 347. 90
1919	76, 487. 96	$21, 886. 76	105. 40 21, 886. 77 21, 886. 77 10, 722. 26	10/2/23 9/15/20 6/14/20 3/10/20	10/15/25 10/15/25 10/15/25 10/15/25	12. 87 6, 675. 46 7, 007. 36 3, 600. 77
Total interest allowed for 1919						17, 296. 46

Treasury checks for the amounts of overpayments with interest found by the commissioner to be refundable were issued by the disbursing clerk of the Treasury Department on March 10, 1926. July 6, 1926, the collector mailed to the plaintiff a certificate of overassessment for 1918 in the amount of $76,167.50, together with a Treasury check in the amount of $103,515.40, the amount of overpayment and interest thereon in the amount of $27,347.90, and a certificate of overassessment for 1919 in the amount of $76,487.96, to-

gether with a Treasury check in the amount of $71,897.66, being the amount refundable, of $54,601.20, and interest of $17,296.46.

VIII. Plaintiff requested the commissioner to allow and pay additional interest computed under the provisions of section 1019 of the revenue act of 1924 from the dates of overpayments to December 2, 1925, the date on which he approved the schedule of refunds and credits, but the commissioner refused to do so.

The court decided that plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The overpayment in this case was allowed within the meaning of section 1019 of the revenue act of 1924 as construed by the court in *Girard Trust Company* v. *United States*, 270 U. S. 163, prior to February 26, 1926, the date of the enactment of the revenue act of 1926.

The Commissioner of Internal Revenue signed the first schedule of overassessments October 15, 1925, and approved the schedule of refunds and credits certified to him by the collector and authorized the disbursing clerk of the Treasury Department to pay the amounts found to be refundable on December 2, 1925. The refund was not paid until March 10, 1926, and inasmuch as the revenue act of 1926 had become effective prior to that date, the commissioner held that under the provisions of section 1116 (c) of the 1926 act, which makes the provisions of the section allowing interest only to the first date on which the commissioner signs the schedule, applicable to all refunds paid after its passage, interest was payable only to October 15, 1925, the first date on which he signed the schedule of overassessments in respect thereof. Plaintiff claims additional interest from October 15 to December 2, 1925, the latter date being the date on which the court in *Girard Trust Company*, *supra*, held that the overpayment was allowed under the provisions of the revenue act of 1924 and that, inasmuch as the commissioner had allowed the refund prior to the passage of the revenue act of 1926, the act, by its terms, is not applicable to refunds certified for payment prior to its enactment.

Plaintiff further contends that if section 1116 of the revenue act of 1926 applies to the computation of interest on overpayments allowed prior to its passage, it deprives him of a vested right in violation of the fifth amendment to the Constitution and amounts to the taking of private property without just compensation.

In support of his claim that the provisions of section 1116 of the revenue act of 1926 are not applicable to the refund in this case the plaintiff insists that the only meaning which can be drawn from paragraph (a) of section 1116 providing for the payment of interest "upon the allowance of a refund" and paragraph (c) which makes the entire section applicable to any refund paid after the enactment of the act even though such refund was allowed prior to such date is that if a refund, which is paid after the passage of the act, was also allowed (that is, if the second schedule was signed) after the passage of the act, then and only then shall interest be computed to the first date on which the commissioner signed the schedule, even though under the 1926 act the date of allowance, that is, the first date he signed the schedule, was prior to the passage of the act. In other words, it is insisted that section 1019 of the 1924 act applies in all cases where the commissioner signed the second schedule while such act was in force.

Upon this basis plaintiff insists that section 1116 should be construed as providing that "*upon the allowance of a claim* for refund interest shall be paid to the first date on which the commissioner signed the schedule of overassessment; and this rule shall apply to any refund paid after the enactment of this act, *even though the first schedule was signed prior to the passage of this act*"; that the phrase "even though" is interpreted to be one of inclusion, and by its use is intended to fix the boundary line of what is included within and what is beyond the operation of the 1926 act; that, as thus construed, the section can only apply to refunds which have progressed no further than the first stage, namely, entered on the "first schedule" signed by the commissioner; that there is nothing in the language of the act which warrants a more inclusive interpretation; that if Congress had intended that interest on all refunds paid on

or after February 26, 1926, should be calculated under the provisions of the 1926 act, it would have provided that the section should apply to *every refund* thereafter paid.

There is no ambiguity in the section. Its language is too clear to admit of doubt. It provides that upon the allowance of a refund interest shall be paid to the first date on which the commissioner signs the schedule of overassessments and that in any case where the refund has not been *paid* at the time of the enactment of the act, even though it has been allowed, interest shall be paid only to the date of signing of the first schedule. Prior to the enactment of this section the date of the allowance of the refund and the date to which interest was payable under the 1924 act had been determined by the court in *Girard Trust Company* v. *United States*, *supra*, to be the date on which the commissioner signed the schedule of refunds and credits certified to him and authorized the disbursing clerk to pay the same. The plain purpose of section 1116 of the 1926 act was to shorten the interest period to the first date on which the commissioner signed the schedule of overassessments notwithstanding both the first and the second schedules had been approved prior to February 26, 1926. It changed the rule announced in the *Girard Trust Co. case*. We are of opinion, therefore, that there is no merit in the plaintiff's claim that the section is not applicable to this case.

In the opinion of the court there is no merit in the claim of plaintiff that section 1116 is unconstitutional. Except as given by Congress, plaintiff had no right to interest; nor did he have a right to maintain a suit for the recovery of interest that could not be taken away even though such suit had been authorized by existing law at the time it was commenced. The allowance of interest by the sovereign is a matter of grace, depending upon its consent, which it can withdraw or modify at any time. The act in question should therefore be construed as withdrawing the consent of the United States for the recovery of interest in excess of that granted by the act in effect at the time the refund was paid. *Beers* v. *Arkansas*, 20 How. 527; *Railroad Company* v. *Alabama*, 101 U. S. 832; *United States* v. *Heinszen & Company*, 206 U. S.

370; *United States* v. *Magnolia Petroleum Company*, 276 U. S. 160.

Section 1116 did not change or affect in any way the settlement of tax accounts which had been accomplished finally by payment. It established a new basis for the computation of interest to be paid in those cases where the refund had not been paid prior to the enactment of this section.

Plaintiff is not entitled to recover, and the petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WILLIAM E. B. GRANT v. THE UNITED STATES

[No. K-302. Decided June 2, 1930]

On Demurrer to Petition

Statute of limitations; Panama Canal pay; deduction of military pay; retired pay of enlisted men.—The act of August 24, 1912, did not authorize the deduction from the salary or compensation of employees of the Panama Canal, who were also retired enlisted men of the Navy, their retired pay as such enlisted men, and the acts of May 31, 1924, and of March 12, 1928, do not have the effect of a new promise to pay such a deduction, erroneously made, suit for which, but for said acts, is admittedly barred by the statute of limitations. The acts of 1924 and 1928 did not change the act of 1912, as to such deduction, but merely construed the same.

The Reporter's statement of the case:

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the demurrer. *Mr. Charles F. Kincheloe* was on the brief.

Mr. George A. King, opposed. *King & King* were on the brief.

The opinion sets forth the material averments of the petition.

Opinion of the Court

GREEN, *Judge*, delivered the opinion of the court:

The petition alleges in substance that plaintiff was retired as a warrant machinist in the United States Navy on December 4, 1903, for incapacity resulting from an incident of service and is still in a retired status, and that since his retirement he was employed by the Isthmian Canal Commission and by the Panama Canal as inspector, at a station in Baltimore, Maryland, under various appointments and with certain compensation involving the periods from April 7, 1909, to May 3, 1917, and November 29, 1919, to February 28, 1922.

The petition further alleges in substance that there was withheld from the plaintiff each month during the period of his service as aforesaid a sum equal to the amount of his pay as a retired officer of the United States for the time involved.

The plaintiff therefore seeks to recover a sum equal to the aggregate of his retired pay as a retired naval officer from April 7, 1909, to May 3, 1917, and from November 29, 1919, to February 28, 1922.

The defendant demurs to the petition on the ground that the cause of action set forth therein is barred by the statute of limitations, the petition in the case having been filed June 28, 1929, and more than six years after the claim set forth in the petition first accrued.

The last services rendered by the plaintiff, as alleged in the petition, were on February 28, 1922. There seems, therefore, to be no question but that the claim of the plaintiff had accrued on March 1, 1922, which is more than six years before the filing of the petition. The plaintiff, however, contends that the acts of May 31, 1924 (43 Stat. 245), and March 12, 1928 (45 Stat. 310), had the effect of a new promise to pay the debt owing for plaintiff's services and to extend the period of limitations so that it would have no application to the case. This contention makes it necessary for us to consider the construction and effect of the provisions of the statutes upon which it is based.

Section 4 of the act of August 24, 1912 (37 Stat. 561), establishing a permanent organization for the Panama Canal, so far as is material in this case, provides:

"If any of the persons appointed or employed as aforesaid shall be persons in the military or naval service of the United States, the amount of the official salary paid to any such person shall be deducted from the amount of salary or compensation provided by or which shall be fixed under the terms of this act."

The act of May 31, 1924 (relied upon by plaintiff), amended the act of July 31, 1894 (28 Stat. 205), by adding thereto the following sentence:

"Retired enlisted men of the Army, Navy, Marine Corps, or Coast Guard retired for any cause, and retired officers of the Army, Navy, Marine Corps, or Coast Guard who have been retired for injuries received in battle or for injuries or incapacity incurred in line of duty shall not, within the meaning of this section, be construed to hold or to have held an office during such retirement."

It appears that the Comptroller General, in a decision dated September 22, 1919, held that retired enlisted men are not in the military or naval service of the United States within the meaning of the act of August 24, 1912, "to the extent that their pay as such is comprehended within the term 'official salary,'" and that they might be employed by the Panama Canal without deducting their retired pay from their compensation as such employees. This decision was overruled by the Comptroller General on September 28, 1923, and upon recommendation of the Secretary of War Congress enacted the provisions of the statute of May 31, 1924, above referred to and set out. Nevertheless the Comptroller General held that the act of May 31, 1924, did not affect the status of retired enlisted men under the act of 1912, and the situation being again considered by Congress, on March 12, 1928, a statute was enacted providing in part that section 4 of the Panama Canal act "shall not be construed as requiring the deduction of the retired pay or allowances of any retired warrant officer or enlisted man of the Army, Navy, Marine Corps, or Coast Guard * * * from the amount of the salary or compensation provided by

or fixed under the terms of the Panama Canal act, as amended."

As before stated, counsel for plaintiff contend that the said acts of 1924 and 1928 remove the bar of the statute of limitations in the case under consideration. The question thus arising is possibly not free from doubt but on the whole we think the contention can not be sustained.

In the case of *Crede H. Calhoun, Admr.*, v. *United States*, 66 C. Cls. 545, which was similar in its facts to the one at bar and in which a similar deduction was made from the salary in controversy, it was held that the deduction was not rightfully made, but the statute of limitations was not involved. In the opinion this court said:

"From the date of the Panama Canal act in 1912 and until the decision of the Comptroller General in 1923, throughout a period of eleven years, no such deduction had ever been made. Congress had repeatedly and consistently indicated its policy on the subject, and by the amendatory act of May 31, 1924, had expressly declared that policy. In the enactment of the recent act Congress has placed a legislative construction upon its own prior act by declaring that said act *shall not be construed* as applying to a retired enlisted man."

But the court further said in this connection:

"Aside, however, from this conclusion, we are of the opinion that the language used in the act of 1912 clearly indicates that the act was not intended to apply to retired enlisted men."

It will be observed that in the paragraph last quoted from this decision the court definitely held that the act of 1912 was never intended to apply to retired enlisted men. We agree with this and reaffirm the former decision. Nor do we think that the fact that Congress passes an amendment to an act on account of a decision made by the Comptroller General necessarily shows that Congress accepts the construction placed upon the act by that officer. The reason for passing the act may be to remove the necessity of commencing a suit to test the correctness of his rulings and relieve numerous claimants from the expense attached thereto, which in some cases might be as much as the amount of the claim.

Opinion of the Court

In any event we think, as said in the *Calhoun case, supra*, that Congress, by the amendments referred to, merely placed a legislative construction on its previous enactments. It did not change the act of 1912 but stated how it should be construed. The result, we think, was quite different from what it would have been had the act been changed so as to give the plaintiff a right which he did not before possess.

There is also another difference which we think is decisive of the case. The plaintiff cites a number of decisions in which it appeared that there had been an appropriation made by Congress to pay the claim on which suit was brought, or a check or a warrant had been issued for its payment by the Government officials, or some other similar action had been taken. Obviously the making of an appropriation to pay a claim, or the issuance of a warrant for its payment, is a recognition of its validity which would affect the running of the statute of limitations, but it should be particularly observed in this connection that such action is a recognition of a specific claim and the amount thereof. In other words, it is an acknowledgment or admission that the Government is indebted to the claimant in a specific amount. In this case there is nothing that amounted to an acknowledgment of indebtedness under any reasonable construction of the amending statutes. What Congress did was to prescribe a rule which should be followed by the courts and its auditing officials in determining the law as *applicable to a certain class of cases*. In the cases relied upon by plaintiff the facts were admitted and that under the law applicable thereto a certain amount was due on the claim to the claimant. But in the case at bar there is no admission that anything is due the plaintiff, and no facts whatever were admitted. Claimants must still present proof of their cases either to the Government officials or to the court, as the case might be. It is true that when this proof was offered the law applicable thereto was made definite; but the rule was no different than what it was before the amending statutes were enacted. An examination of the decision in the *Calhoun case, supra*, will show that the court considered that the question therein was whether the act of

1912 was applicable; and its conclusion, as stated in the last paragraph of the opinion, was "that the pay received by retired enlisted men in the military or naval service of the United States is not *official salary* as that term is used in the act of August 24, 1912."

It follows that the claim of plaintiff is barred by the statute of limitations and that his petition must be dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

ROBERT H. FUREY v. THE UNITED STATES

[No. J-572. Decided June 2, 1930]

On the Proofs

Coast Guard pay; act of June 10, 1922; temporary service created by act of April 21, 1924; appointment thereto.—The increase in the Coast Guard authorized by the act of April 21, 1924, created a temporary and not a permanent force, and an officer's appointment thereto is not an appointment in the permanent service within the meaning of the joint service pay act of June 10, 1922.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *King & King* were on the brief.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant. *Mr. Charles F. Kincheloe* was on the brief.

The court made special findings of fact, as follows:

I. Robert H. Furey was first commissioned an ensign (temporary) in the Coast Guard on August 18, 1924, in accordance with the provisions of the act of April 21, 1924 (43 Stat. 105, 106), "An act to authorize a temporary increase of the Coast Guard for law enforcement"; was promoted to lieutenant, junior grade (temporary), October 2, 1925; and was commissioned lieutenant, junior grade (permanent), on March 7, 1927, and is still serving in that grade.

II. From August 18, 1924, to August 17, 1927, plaintiff received the pay and allowances of the first pay period as provided in the act of June 10, 1922 (42 Stat. 625), namely, pay at the rate of $125 per month, subsistence allowance at the rate of 60 cents per day, and for the periods November 1, 1924, to October 31, 1925, inclusive, and November 1, 1926, to August 17, 1927, inclusive, rental allowance at the rate of $40 per month. On August 17, 1927, he completed three years of service and following that date received the pay and allowances of the second pay period as provided in said act of June 10, 1922, namely, pay at the rate of $175 per month, subsistence allowance at the rate of $1.20 per day and rental allowance at the rate of $60 per month.

III. If allowed pay of the second pay period from March 7, 1927, to August 17, 1927, there would be due him $223.61, representing the difference between $1,500 per annum and $2,000 per annum for 5 months and 11 days.

Also, if entitled as an officer with a dependent (wife) to rental and subsistence allowances as an officer of the second pay period for the same period, there would be due him rental allowance $107.33, and subsistence allowance $98.40. The claim for pay and allowances would be the sums of $223.61 and $205.73, or a total of $429.34.

The court decided that plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff, Robert H. Furey, was on August 18, 1924, commissioned an ensign (temporary) in the Coast Guard. The act of April 21, 1924 (43 Stat. 105), authorized temporary increases of the Coast Guard for law enforcement, and in pursuance of the act the President appointed the plaintiff. On October 2, 1925, the plaintiff was promoted to lieutenant, junior grade (temporary), and finally on March 7, 1927, the plaintiff received a permanent appointment as lieutenant, junior grade, and is now in the permanent service.

The joint service pay act of June 10, 1922 (42 Stat. 625), provides the following rates of pay, viz:

"An act to readjust the pay and allowances of the commissioned and enlisted personnel of the Army, Navy, Marine

Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service.

"*Be it enacted* [etc.], That, beginning July 1, 1922, for the purpose of computing the annual pay of the commissioned officers of the Regular Army and Marine Corps below the grade of brigadier general, of the Navy below the grade of rear admiral, of the Coast Guard, of the Coast and Geodetic Survey, and of the Public Health Service below the grade of surgeon general, pay periods are prescribed, and the base pay for each is fixed as follows:

"The first period, $1,500; the second period, $2,000; the third period, $2,400; the fourth period, $3,000; the fifth period, $3,500; and the sixth period, $4,000.

* * * * * * *

"The pay of the second period shall be paid to captains of the Army, lieutenants of the Navy, and officers of corresponding grade who are not entitled to the pay of the third or fourth period; to first lieutenants of the Army, lieutenants (junior grade) of the Navy, and officers of corresponding grade who have completed three years' service, or whose first appointment in the permanent service was in a grade above that corresponding to second lieutenant in the Army; and to second lieutenants of the Army, ensigns of the Navy, and officers of corresponding grade who have completed five years' service.

"The pay of the first period shall be paid to all other officers whose pay is provided for in this section."

The plaintiff received the pay and allowances of his rank and grade as a temporary officer until August 17, 1927, when, upon the completion of three years of service, he became entitled to the pay and allowances of the second period. This suit is for the recovery of the pay and allowances of the second period from March 7, 1927, the date of his permanent appointment, to August 17, 1927, the date when he began to receive the pay of the second period under the foregoing statute.

The case turns upon the construction to be given to the provision in the act of June 10, 1922 (*supra*), which accords to officers the pay and allowances of the second period "whose first appointment in the permanent service was in a grade above that corresponding to second lieutenant in the Army." The plaintiff meets all the requirements of the act unless it may be held that his temporary appointment

as an ensign made August, 1924, was his first appointment in the permanent service. The Comptroller General in a written opinion announced June 3, 1927, adhered to a previous holding in a similar case (5 Comp. Gen. 33) announced on August 9, 1926, and denied the plaintiff's right to second-period pay. The above opinions, upon which the defendant relies, are predicated upon a conclusion that the act authorizing a temporary increase in the Coast Guard did not create an adjunct force and "that an officer who was appointed a second lieutenant, temporary, in the Marine Corps, thereunder, and who was subsequently appointed a first lieutenant in the Marine Corps was first appointed in the permanent service in the grade of second lieutenant." With this conclusion we are unable to agree. The act of April 21, 1924 (*supra*), does, in our opinion, provide an auxiliary force, one set up in the manner designated in the statute, one distinctly recognized in section 4 (c) of the act wherein by the express directions of the law "all persons appointed under this section shall be placed upon a special list of temporary officers, as distinguished from the list of permanent officers, of the Coast Guard. The President is authorized, without regard to length of service or seniority, to promote to grades not above lieutenant, in the line or Engineer Corps, or to reduce officers on such special list, within the number specified for each grade, and he may, in his discretion, call for the resignation of, or dismiss, any such officer for unfitness or misconduct." Obviously, the legislation recognizes and maintains the distinction between the temporary and permanent forces of the service. No apparent necessity exists for discriminating between the status, pay, and allowances as provided in the act of June 10, 1922 (*supra*), of a temporary and permanent officer of the Coast Guard if a temporary appointment is to be considered a first appointment in the permanent service. In the use of this latter term Congress was addressing legislation to a service long since established, organized under prior laws, permanent in character, and to be continued. Just why an officer of the temporary service, who had attained the rank and grade of lieutenant, junior grade, should be denied the pay of his rank and grade when

appointed for the first time in the permanent service, and another officer of the same rank and grade, who had attained his advances outside the temporary service, should receive the greater pay allowed by the statute when first appointed in the permanent service, is not apparent. The act, we think, was not intended to, and did not, accomplish this result. In legislating with reference to appointments in the permanent service, Congress fixed the status of officers in that service just as was done with meticulous care for officers in the temporary service or those transferred from the permanent to the temporary service. Congress throughout the series of acts respecting this issue has consistently maintained the distinction between the temporary and permanent service in the guard. The act of July 3, 1926 (44 Stat. 815), by the following provisions exemplifies this fact:

"An act to readjust the commissioned personnel of the Coast Guard, and for other purposes.

"*Be it enacted* [etc.], That on and after July 1, 1926, the number of regular commissioned officers, other than chief warrant officers, authorized in the Coast Guard shall be three hundred and forty, distributed in grades as follows: * * *

* * * * *

"SEC. 2. That on and after July 1, 1926, the number of temporary commissioned officers authorized in the Coast Guard shall be one hundred and fifteen, distributed in grades as follows: Fifty lieutenants, and sixty-five lieutenants (junior grade) and ensigns of the line, and after that date no more temporary officers shall be appointed in the grade of lieutenant commander or above.

* * * * *

"SEC. 5. That the President is authorized to appoint, by and with the advice and consent of the Senate, temporary commissioned officers to be commissioned officers in the regular Coast Guard in grades not above lieutenant: *Provided*, That no temporary officer shall be appointed a regular commissioned officer until his entire fitness for such appointment has been established to the satisfaction of a board of commissioned officers of the Coast Guard appointed by the President, and until he has been pronounced physically qualified by a board of medical officers: *Provided further*, That temporary officers who may be thus commissioned in the regular Coast Guard shall take rank in the grades in which they are

appointed in accordance with the dates of their commissions as regular officers."

Continuously in practically all the sections of the above law, many of which we do not quote, provision is made as to "temporary," "regular," "temporary commissioned officers," and "commissioned officers in the regular Coast Guard." This, we think, as observed by plaintiff in the brief, discloses "the exact distinction drawn for pay purposes by the act of June 10, 1922."

The plaintiff served for almost three years as a temporary officer of the Coast Guard. He was advanced in rank and grade to lieutenant, junior grade, and held that rank and grade when made an officer in the permanent service. Surely the pay statutes which apply to permanent officers in the permanent service were intended to apply to him with the same degree of equality, both as to length of service, rank, and grade, as apply to others in a similar status upon their first induction into the permanent service. Congress used the term "permanent service" and by so doing clearly recognized the right to pay and allowances so fixed for service in the guard of indefinite tenure, to which the officer was appointed. We need not comment upon the distinction between temporary and permanent service; the statutes disclose the intent of the Congress.

Judgment for plaintiff for $429.34. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge*, and GREEN, *Judge*, concur.

JOHN O. GARRETT v. THE UNITED STATES

[No. K–132. Decided June 2, 1930]

On the Proofs

Jurisdiction; authority of Congress to create liability and waive defenses.—Congress has authority to create a liability on the part of the Government where no legal liability exists, and to waive any legal defenses on the part of the Government.

Same; relief act of March 1, 1929; absence of legal liability.—The relief act of March 1, 1929, vested in the Court of Claims power to render judgment in favor of a seaman, judgment creditor of a

defunct corporation whose deposit made on purchase price of a Shipping Board vessel had been covered into the Treasury of the United States, notwithstanding there was no legal liability upon the part of the United States.

Statutory construction; effect of title.—In the interpretation of a statute the title will be given due consideration.

Same; reports of congressional committees.—Reports of committees of Congress made at the time a bill is reported from a committee to the Congress for consideration are treated by the courts as having great and generally controlling weight in the construction of statutes enacted on the strength of such reports. See *Nolan* v. *United States, post*, p. 357.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *Mr. Charles A. Taussig* and *King & King* were on the brief.

Mr. John E. Hoover, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, John O. Garrett, is a resident of the State of New York, and a citizen of the United States.

II. The plaintiff was employed by the Black Star Line, Incorporated, as a marine engineer in charge of a vessel known as the *Kanawha*, from July 11, 1921, to on or about June 12, 1922. The Black Star Line, Inc., was a Delaware corporation, with its office and place of business in the city, county, and State of New York. It is now a defunct corporation, having been dissolved for the nonpayment of taxes. No receiver was ever appointed to wind up its affairs, and the present whereabouts of its stockholders and officers is not known.

III. Early in the year 1921, the Black Star Line, Inc., entered into negotiations with the United States Shipping Board Emergency Fleet Corporation for the purchase of the S. S. *Orion*, a Government owned vessel. The Black Star Line submitted a bid of $225,000 for the said vessel and made an advance payment to the United States Shipping Board Emergency Fleet Corporation of $22,500.

Reporter's Statement of the Case

IV. After submitting its bid for the purchase of the S. S. *Orion* and making the advanced payment thereon of $22,500, the Black Star Line encountered financial difficulties and was unable to meet the terms required by the Shipping Board for the consummation of its contract for the purchase of the said vessel.

V. The Shipping Board in anticipation of the sale of the S. S. *Orion* to the Black Star Line, Inc., expended the sum of $875.34, in reconditioning the said vessel preparatory to its delivery to the Black Star Line.

Upon the failure of the Black Star Line to consummate its contract for the purchase of the S. S. *Orion*, the Shipping Board, after deducting the sum of $875.34 which it had expended in repairing the said vessel, covered the balance of the $22,500 advance payment received by it from the said Black Star Line into the Treasury of the United States. The sum covered into the Treasury was $21,624.66.

VI. The plaintiff thereafter entered suit against the Black Star Line in the Supreme Court of the State of New York, for the amount of wages and subsistence due him, as a marine engineer in charge of the vessel *Kanawha*, from July 11, 1921, to on or about June 12, 1922, and on January 28, 1925, recovered judgment for the amount claimed, with interest thereon to date of judgment and costs of suit, amounting to $5,836.64. No part of this judgment has been paid or otherwise satisfied.

VII. On December 16, 1921, Albert A. Zinc and 28 other seamen, employees of the Black Star Line, obtained a judgment against the said corporation in the United States District Court for the Southern District of the State of New York, for the sum of $12,303.35 for wages earned as employees of the said corporation.

VIII. By an act of Congress, approved March 1, 1929, Congress conferred jurisdiction upon the Court of Claims to hear and adjudicate the claims of the plaintiff and other judgment creditors of the Black Star Line, Inc., and vested the court with the authority to enter judgment in their favor in amounts not exceeding the aggregate sum of $21,624.66, the amount of money deposited in the United States Treas-

ury by the United States Shipping Board Emergency Fleet Corporation.

The court decided that plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff in this case seeks to recover the sum of $5,836.64, the amount of a judgment entered in his behalf against the Black Star Line, Inc., on January 28, 1925, in the Supreme Court of the State of New York, the same being for wages due the plaintiff for services rendered as a marine engineer in charge of the *Kanawha*, a vessel owned and operated by the said Black Star Line, Inc.

The plaintiff bases his right to recover on the provisions of an act of Congress of May 1, 1929 [45 Stat. 2345], referred to in Finding VIII, which reads as follows:

[PRIVATE—No. 459—70TH CONGRESS]
[S. 2291]

An Act For the relief of certain seamen and any and all persons entitled to receive a part or all of money now held by the Government of the United States on a purchase contract of steamship Orion who are judgment creditors of the Black Star Line (Incorporated) for wages earned.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and hereby is, conferred upon the Court of Claims, notwithstanding any lapse of time or statute of limitation, and without the permission on the part of the Government or its representatives, to interpose any kind of defense to said claim, except to have the person, persons, corporation, or corporations to whom such money or a part of such money shall belong, as a matter of equity and justice to hear, adjudicate, and render judgment, such as equity and justice may require, in favor of such person, persons, corporation, or corporations, as upon a determination of the facts heard by said court, the said court shall determine, is entitled to receive such money in the sum of $21,624.66 less any cost legally incurred in the Court of Claims, which said sum of money has been paid into the Treasury of the United States by the United States Shipping Board, on account of a purchase by the Black Star Line (Incorporated) or other persons in their behalf, of a certain ship known as

the steamship Orion. It is hereby recognized by this Act that the said sum of money above set forth, in equity and good conscience, does not belong to the United States Government, and the Court of Claims is vested with full jurisdiction, under its rules and proceedings, to render judgment for such money or parts thereof as in equity and good conscience any person or persons, corporation, or corporations, may be entitled to receive.

Approved March 1, 1929.

The Black Star Line, Inc., a Delaware corporation, with its office and place of business in New York City, was engaged in the business of owning and operating ocean-going steam vessels.

On August 2, 1921, the Black Star Line, Inc., through its agents, deposited with the United States Shipping Board the sum of 12,500, and on December 22, 1921, deposited an additional sum of $10,000, making a total sum of $22,500, so deposited towards the purchase from the Shipping Board of the S. S. *Orion*, a Government-owned vessel.

On account of financial difficulties, the Black Star Line, Inc., was not able to comply with the terms of the proposed purchase and sale of the said vessel and the sale was not consummated. The Shipping Board thereafter deposited the $22,500 so received, less $875.34 costs incurred in conditioning the said vessel in anticipation of its sale to the Black Star Line, Inc., in the Treasury of the United States.

The Black Star Line, Inc., has been dissolved for nonpayment of taxes and no longer exists as a corporation.

In addition to the judgment obtained against the Black Star Line, Inc., by the plaintiff, certain other seamen employed on the ship *Kanawha*, were awarded judgments for wages earned, by the United States District Court of Southern New York in amount aggregating $12,303.35, making the total amount of the judgments entered in favor of these employees of the Black Star Line, Inc., the sum of $18,139.99.

The $21,624.66 received by the Shipping Board from the Black Star Line, Inc., is now in the Treasury, where it has been for nearly nine years.

The jurisdictional act states:

"It is hereby recognized by this act that the said sum of money above set forth, in equity and good conscience, does

Opinion of the Court

not belong to the United States Government, and the Court of Claims is vested with full jurisdiction, under its rules and proceedings, to render judgment for such money or parts thereof as in equity and good conscience any person or persons, corporation or corporations, may be entitled to receive."

To whom do these funds in equity and good conscience belong? The title of the act leaves no doubt as to the judgment of Congress on that point:

"An act for the relief of certain seamen and any and all persons entitled to receive a part or all of money now held by the Government of the United States on a purchase contract of steamship Orion who are judgment creditors of the Black Star Line (Incorporated) for wages earned."

It is a recognized rule of statutory construction that the title of an act is entitled to consideration, as showing the purpose and intent of the framers in its enactment.

Chief Justice Marshall in *United States* v. *Fisher*, 2 Cranch 358, announced the rule that:

"Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."

In *United States* v. *Palmer*, 3 Wheaton 610, 631, the court said:

"The title of an act can not control its words, but may furnish some aid in showing what was in the mind of the legislature."

There can be no doubt that the jurisdictional act, taken as a whole, expresses the deliberate judgment of Congress that these funds in equity and good conscience belong to certain seamen, judgment creditors of the Black Star Line, Inc., for wages earned. This fact is further clearly indicated by the language used by the Senate committee in reporting the bill:

"* * * The judgment creditors were therefore without remedy at law and are seeking relief from Congress in order that their judgments may be paid. The bills now pending before Congress are for that purpose, and it is maintained on behalf of the judgment creditors that the United States should not profit at the expense of these seamen who as the wards of the law are particularly favored in

the securing of their just compensation. * * * The money in question was money of the Black Star Line and was not forfeited by any action of the Shipping Board or by law to the United States Government. That being the case, these judgment creditors are clearly entitled to be paid."

Counsel for the Government contend that the $21,624.66 covered into the Treasury by the Shipping Board are funds belonging to the Black Star Line, Inc., and that it is not within the power of Congress to legislate for their disposal to the plaintiff or to anyone else. In other words, that Congress has no power to authorize a creditor of the Black Star Line, Inc., to sue the United States in this court on a claim against the Black Star Line, Inc., for funds belonging to that company in the possession of the United States. It is urged that the most the act can do is to provide a forum for the adjudication of the plaintiff's claim, and for rendering judgment according to established legal principles, and that since the plaintiff under the facts presented can not recover under established legal principles, judgment in his favor can not be awarded, as the act creates no liability on the part of the Government.

We do not agree with the position of counsel for the Government. We think the authority of Congress to create a liability against the Government in this case is unquestioned, and that the only reasonable construction which can be placed on the language of the act of reference is that such liability is clearly created.

The authority of Congress to waive a legal defense to a claim and impose conditions under which a claimant may recover in the Court of Claims is upheld in an early decision of this court, *Nock* v. *United States*, 2 C. Cls. 451. The plaintiff in that case had brought an action against the Government for damages resulting from a breach of contract. Upon a trial of the case the court held (1 C. Cls. 71) the plaintiff was not entitled to recover. Afterwards the plaintiff petitioned Congress for relief. Upon a consideration of the petition, Congress referred the matter back to the Court of Claims by the following joint resolution:

Opinion of the Court

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the claim of Joseph Nock, for damages occasioned by the annulment of his contract * * *, be, and it is hereby, referred to the Court of Claims for its decision, in accordance with the principles of equity and justice: *Provided*, That said court do not render judgment for a greater sum than is contained in the report of Solicitor Comstock to the Senate, dated December 22, 1852."

This resolution was brought before Congress by a report of a Senate committee, which in part states:

"This case was afterwards referred to the Court of Claims, which decided adversely to the petitioner upon the technical legal grounds that as there was no legal obligation on the part of the Government under the contract to order more locks than it pleased, and consequently could rescind the contract whenever it pleased, and that the refusal to reassign the contract involved no legal obligation on the Government for damages.

"Yet, in the opinion of this committee, there were equities existing between the Government and said Nock, arising out of this contract; * * *. It is therefore considered that the petitioner is entitled to relief, but as this committee have not the means or facilities to fully investigate the case, it recommends that the matter of the memorial of the petitioner be referred to the Court of Claims to decide upon the principles of equity and justice."

Counsel for the Government contended that the resolution was unconstitutional and void because, (1) That Congress have no judicial powers which will authorize them to set aside the judgment of a court, and award a party a new trial; and, (2) That Congress have also limited the judgment which may be rendered to a certain amount, and that no such discretion to fetter or circumscribe the course of justice is by the Constitution vested in Congress.

In passing upon these points the court said:

"* * * Congress are here to all intents and purposes the defendants, and as such they come into court through this resolution and say that they will not plead the former trial in bar, nor interpose the legal objection which defeated a recovery before, but that they thus consent upon the condition that the recovery, if any shall be had, shall not exceed a certain amount. The claimant has no rights here except under this consent, and he limits his demands accordingly.

* * * the defendants can not be sued except with their own consent; and Congress have the same power to give this consent to a second action as they had to give it to a first.

"It is further objected * * * that the 'authority conferred upon the court to settle this claim according to the principles of justice and equity does not authorize the court to disregard plain principles of law.' * * *

"In the case now before us the report of the committee evidences the fact that Congress have intended to withdraw a harsh and technical defense, and to leave the court free to award damages for injuries actually sustained by the claimant. * * *"

In all essential respects the jurisdictional act in the instant case, and the joint resolution referring the *Nock case*, appear to be practically the same. In each case claimants are authorized to sue on claims for which there is admittedly no legal liability on the part of the Government, and in each there is a limitation placed upon the amount for which the court is authorized to enter judgment.

The authority of Congress to create a liability on the part of the Government where no legal liability in fact exists, and to waive any legal defenses on the part of the Government has not been questioned by this court in any of the numerous cases it has considered under special jurisdictional acts.

Cases cited by counsel for the Government do not lay down the rule that Congress is lacking in authority in this respect.

In *United States* v. *Mille Lac Band of Chippewa Indians*, 229 U. S. 498, it was not held that Congress was without authority to create such liability, but "The jurisdictional act makes no admission of liability, or of any ground of liability * * *. Nor does it contemplate that recovery may be founded upon any merely moral obligation * * *." (Act is set out in full in 47 C. Cls. 416, 417.)

In *Iowa Tribe of Indians* v. *United States*, No. 34677, decided by this court December 2, 1929 [68 C. Cls. 585], the court said:

"The jurisdictional act contains certain provisions which we wish to emphasize by way of italics, viz: '*for the determination of the amount, if any, which may be legally or equitably due said tribe* * * * *under any stipulations*

or agreements, whether written or oral, * * * *or for the failure of the United States to pay any money which may be legally or equitably due said tribe of Indians.*' The act as a whole clearly evinces a congressional intent to refer to this court the rights of the Indians growing out of the transaction wherein the Indians ceded their lands to the Government and the Government assumed obligations to pay therefor. Congress, by the legislation, does not, of course, concede a liability; that is for this court to determine upon principles of law and equity."

This language, we think, falls far short of announcing the rule, contended for by counsel for the defendant, that Congress is without authority to create or recognize a liability on the part of the Government in special jurisdictional acts referring cases to this court. What the court said, and all that it said, was, that taking the particular act it was then considering, as a whole, no liability was conceded. A fair inference from what the court said in this case, also in *United States* v. *Mille Lac Band of Chippewa Indians*, *supra*, is, we think, that Congress had the authority to concede, or create such liability if it had seen fit to do so, and that if liability had been conceded in the act it would have been binding on the court.

Haskell v. *United States*, 9 C. Cls. 410, cited by the defendant, does not support its contention. In that case Congress conferred authority on the Court of Claims, "to adjudicate, on terms of equity and justice, the claims of the heirs and legal representatives of Leonidas Haskell, deceased, for stores furnished the Quartermaster's Department of the Army of the United States." It developed on the trial of the case that the claim had theretofore been settled and paid, and that receipt in full satisfaction of the claim had been given, and that there was no fraud or mistake in the settlement. The court held that the question involved was one of accord and satisfaction and that under the provisions of the jurisdictional act authorizing the court to adjudicate the claim on "terms of equity and justice," the plaintiffs were not entitled to recover. But the court at the conclusion of its opinion said:

"* * * It can not be said here that equity ought to relieve against the bar created by the voluntary receipt in

full, for equity, equally with the law, recognizes and enforces such a bar, unless there are facts which justify the interposition of equitable relief to prevent fraud or injustice; and such facts are not shown in this case. Had Congress directed this court to adjudicate the claim upon its merits, without regard to any technical defense, we might have felt warranted in going into a full investigation of all the facts, and passing upon them, irrespective of the receipt; but the terms of the special act do not seem to us to authorize such a proceeding."

The court here, we think, from the language quoted clearly recognized the authority of Congress to waive, on the part of the Government, the former adjudication of the case, and to create a liability on the part of the Government on a claim, which under the law had been satisfied and settled in full.

In *Braden* v. *United States*, 16 C. Cls. 389, the court makes an exhaustive review of cases, prior to that time referred to the court by special jurisdictional acts, and at the conclusion of the review and analysis of such cases says:

"But the majority of the court limit the expression of their opinion concerning the construction of these referring acts to the following conclusion, viz, that in each case the court will, from the language of the act, and from the nature of the case, and from the surrounding circumstances, endeavor to ascertain and carry out the legislative intent."

If Congress had seen fit to do so it could have made a direct appropriation to the plaintiff and other judgment creditors of the Black Star Line for the amounts due them as such judgment creditors. Congress has the power to appropriate money for the payment of claims based upon considerations of moral obligations or honorary obligations.

"* * * Payments to individuals, not of right, or of a merely legal claim, but payments in the nature of a gratuity, yet having some feature of moral obligation to support them, have been made by the Government by virtue of acts of Congress, appropriating the public money, ever since its foundation. Some of the acts were based upon considerations of pure charity.

* * * * *

"In regard to the question whether the facts existing in any given case bring it within the description of that class

of claims which Congress can and ought to recognize as founded upon equitable and moral considerations and grounded upon principles of right and justice, we think that generally such question must in its nature be one for Congress to decide for itself. Its decisions recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject of review by the judicial branch of the Government. * * *" *United States* v. *Realty Company*, 163 U. S. 427.

If Congress has the power to pay these claimants by making an appropriation out of the Treasury, it seems it would undoubtedly have the authority to enact a statute recognizing such moral obligation, assume liability for its payment, and vest the court with authority to hear and adjudicate such claims and to enter judgment in favor of those to whom the money belongs. The claimants in either case would receive their money by virtue of an act of Congress.

The United States as a sovereign is suable only to the extent and in such manner as it consents to be sued. Congress, under the Constitution, is the branch of the Government vested with the authority of saying when and in what cases the Government consents to be sued, and to what extent and under what conditions it assumes liability. Exercising that authority, the jurisdictional act under which the plaintiff's claim is being considered was enacted.

Under the rule announced in *Braden* v. *United States*, *supra*, that the "court will from the language of the act, and from the nature of the case, and from the surrounding circumstances, endeavor to ascertain and carry out the legislative intent," the plaintiff is entitled to judgment.

The congressional intent is, we think, unmistakable. It appears from the precise words of the title of the act "for the relief of certain seamen * * * who are judgment creditors of the Black Star Line (Incorporated) for wages earned," from the unqualified statement in the report of the Senate committee, "these judgment creditors are entitled to be paid," and from the language of the act itself, "the Court of Claims is vested with full jurisdiction * * * to render judgment for such money or parts thereof as in equity and good conscience any person * * *, may be entitled to receive."

The plaintiff was a seaman. He is a judgment creditor of the Black Star Line for wages earned. The amount due him as such judgment creditor is shown to be the sum of $5,836.64.

Congress by the jurisdictional act assumes on behalf of the Government a liability to pay the plaintiff the amount due him and has empowered the court to enter judgment therefor.

The plaintiff is entitled to recover the sum of $5,836.64 and judgment for that amount is awarded. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

SENECA HOTEL CO. v. THE UNITED STATES

[No. L-1. Decided June 2, 1930]

On Demurrer to Petition

Income and profits tax; loss of business through prohibition; deductibility from gross income of good will.—Where a company, having good will of value, was forced out of business on account of prohibition legislation, the thing it lost was the privilege of carrying on the business, and was not the good will, and the value thereof was not deductible from gross income for loss or obsolescence.

The Reporter's statement of the case:

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the demurrer.

Mr. Spencer Gordon, opposed. *Messrs. Paul E. Shorb* and *Marion P. Wormhoudt*, and *Covington, Burling & Rublee* were on the brief.

The material allegations of the petition are stated in substance in the opinion.

GREEN, *Judge*, delivered the opinion of the court:

This suit was instituted to recover $19,062.65 income and profits taxes which the plaintiff alleges were illegally

collected from it, and the case has been submitted on the demurrer to the petition.

The allegations of the petition material to a ruling upon the demurrer are in substance that the plaintiff, prior to March 1, 1913, and up to and including June 30, 1919, successfully operated a bar in its hotel located at Rochester, New York, where it sold wines and other liquors; that on March 1, 1913, this bar had a good will attached of the value of not less than $97,839.65, and at the beginning of plaintiff's fiscal year ending August 31, 1919, was equal to and in excess of its value on March 1, 1913; that during the said fiscal year the eighteenth amendment to the Constitution of the United States was adopted, and as a result of national prohibition legislation plaintiff was, during said fiscal year, forced to discontinue its bar and the sale of liquors. Accordingly, during the fiscal year ending August 31, 1919, plaintiff's entire good will, which attached to its bar, was lost, destroyed, and became obsolete. About November 15, 1919, plaintiff duly filed with the collector of internal revenue its Federal income and profits tax return for the fiscal year ending August 31, 1919, but erroneously failed to take as a deduction from the gross income the sum of $97,839.65 representing loss of and obsolescence of good will attached to its bar, sustained during the said fiscal year. Said return showed taxes due in the amount of $18,306.58, which were erroneously paid to the collector after the close of the fiscal year of August 31, 1919. Thereafter, the Commissioner of Internal Revenue claimed additional taxes were due from the plaintiff for said fiscal year 1919 in the sum of $5,256.88, which amount also was erroneously collected from plaintiff. Thereafter, the commissioner redetermined and assessed plaintiff's profits tax, and as a result thereof there was refunded about January 18, 1928, to plaintiff by the commissioner the sum of $4,500.81, leaving a balance of $19,062.65 as income and profits taxes paid for the year 1919.

On March 30, 1927, the plaintiff duly filed with the Commissioner of Internal Revenue a claim for refund in the amount of $23,563.46, representing the Federal income and profits taxes erroneously paid and collected for the fiscal year ending August 31, 1919. This refund claim was based

on the ground that due to national prohibition legislation and the resultant discontinuance of plaintiff's bar during the fiscal year ending August 31, 1919, it was entitled to a deduction of $97,839.65 for obsolescence and loss of good will attached to its bar. On January 6, 1928, this claim for refund was rejected and no part of it has been paid.

The defendant demurs to the petition on the grounds that it does not set forth a cause of action, or one within the jurisdiction of this court. In argument it is insisted by counsel for defendant that the statutory provisions with reference to the deduction of a loss from gross income in order to ascertain the amount of net have no application to a case of this kind.

It will be observed that plaintiff's claim for refund is based upon the theory that it is entitled to a deduction from its gross income for the year in question on account of loss of good will caused by the enactment of Federal constitutional and legislative provisions which forbade the carrying on of the business to which it alleges the good will was attached. We think the principles laid down in *Clarke* v. *Haberle Brewing Co.*, 280 U. S. 384, and *Renziehausen* v. *Lucas*, 280 U. S. 387, are decisive of the case at bar. In the *Clarke case*, *supra*, the Supreme Court said:

"It seems to us plain without help from *Mugler* v. *Kansas*, 123 U. S. 623, that when a business is extinguished as noxious under the Constitution the owners can not demand compensation from the Government, or a partial compensation in the form of an abatement of taxes otherwise due."

Counsel for plaintiff contend that there is a distinction between the case last cited and the case at bar in that in the present case it is claimed there was a "loss" of the good will, and in the *Clarke case* the plaintiff claimed an allowance for "exhaustion, including obsolescence, of its good will," but we do not think it makes any difference in the application of the rules and principles laid down in the case last cited. The only difference between the two cases is that in the *Clarke case* a partial loss was claimed and in the case at bar the claim is for a total loss. In the *Clarke case* Mr. Justice Holmes said that the language of the statute did not become "more applicable because the death is linger-

Syllabus

ing rather than instantaneous." In the case at bar we think we can with propriety say that the provision of the statute relied upon is not more applicable because the death is instantaneous rather than lingering.

Moreover, the claim of the plaintiff seems to be based upon a misapprehension as to the nature of its loss. The allegation is that it is entitled to a deduction "for obsolescence and loss of good will attached to its bar." In *National Chemical Manufacturing Co.* v. *United States*, 67 C. Cls. 607, we said that—

"Good will is the favor which the management of a business wins from the public."

This was not affected by the prohibition legislation. What the prohibition legislation did was to take from plaintiff the privilege of carrying on the business which it had theretofore possessed. The loss which it sustained was the loss of this privilege, which was always subject to revocation, and it is, as we think, clear that Congress did not intend to enable parties to reduce their taxes on the ground that this privilege had been taken away.

It follows that the demurrer must be sustained and the petition of plaintiff dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

WILLIAM G. BECKERS v. THE UNITED STATES[1]

[No. K-263. Decided June 2, 1930]

On the Proofs

Income tax; profit from sale of stock issued as dividend and representing increase of capitalization.—Under the revenue acts, where a taxpayer sells original shares of stock together with shares substantially of the same character or preference that have been issued to him as dividend thereon, gain measured by the difference between the cost of the original shares and the sale price of the entire issue is taxable as income. See *Chapman* v. *United States*, 63 C. Cls. 106; 275 U. S. 524. This

[1] Certiorari applied for.

rule is not affected by the fact that the statute attempting to tax the stock dividend as income at the time it was received was held invalid.

The Reporter's statement of the case:

Mr. James Craig Peacock for the plaintiff. *Mr. C. E Koss* was on the brief.

Mr. Assistant Attorney General Charles B. Rugg for the defendant. *Messrs. J. H. Sheppard* and *Ottamar Hamele* were on the brief.

The court made special findings of fact, as follows:

I. Plaintiff is a citizen of the United States and a resident of the city of New York, State of New York.

II. In 1915 W. Beckers Aniline & Chemical Works, Inc., was incorporated, and plaintiff acquired a block of its stock at a cost of $325,000. In 1916 plaintiff received a stock dividend of $325,000 on this stock, and in 1917 he received a further stock dividend in the same amount. Each of the said stock dividends received by the plaintiff was originally included by him as income in his income tax return for the year in which received, but upon a redetermination of plaintiff's liability for the years 1916 and 1917 by the Commissioner of Internal Revenue, the said stock dividends were eliminated from the taxable income of the plaintiff for those years. Each of the said stock dividends received by plaintiff was paid out of the earnings or profits of the company and represented a transfer of $325,000 from surplus to capital account on its books.

III. In 1917 plaintiff sold all of his stock in the company (both his original stock and that which he had received as stock dividends). He received $891,250 of the purchase price in 1917 and the balance amounting to $528,333.50 in 1918.

IV. The Commissioner of Internal Revenue in 1922 assessed against plaintiff additional income taxes of $159,517.57 for 1917 and $429,856.78 for 1918. In determining these additional taxes the commissioner used $325,000, the cost of the original stock in 1915, as the basis for computing the taxable gain on the sale of all the stock as described above, and thus

determined a gain or profit of $566,250 in 1917 and of $528,-333.50 in 1918.

V. The additional assessment of $159,517.57 made against the plaintiff for the taxable year 1917 was paid in part by crediting overassessments of $10,500 and $62,400, found to be due the plaintiff for the years 1915 and 1916, respectively, to the said assessment of $159,517.57. The said overassessments were allowed by the Commissioner of Internal Revenue on a schedule signed by him on June 1, 1922. On June 30, 1922, the collector of internal revenue returned a schedule to the Commissioner of Internal Revenue showing that the said overassessments had been credited to the said additional assessment for 1917. The said schedule returned by the collector was signed by the said commissioner on July 11, 1922. The balance of the additional assessment, $86,617.57, was paid by the plaintiff to the collector of internal revenue on July 19, 1922, under protest.

VI. The additional assessment of $429,856.78 made against the plaintiff for the taxable year 1918 was paid to the collector of internal revenue on July 19, 1922, under protest.

VII. On July 17, 1926, plaintiff duly filed claim for refund of the additional taxes for 1917 and 1918 upon the grounds referred to in a letter dated June 8, 1927, from the office of the Commissioner of Internal Revenue, in which plaintiff was advised that his claims would be rejected. The letter read in part as follows:

"The claims are based on the statement that the profit as determined by this office and previously included as income from the liquidation of the W. Beckers Aniline & Chemical Works should be decreased due to the increasing your investment by $650,000, representing stock dividends received by you in the years 1916 and 1917.

"You are advised that stock received as a stock dividend does not constitute taxable income but any profit derived from the sale of such stock is taxable income. For the purpose of ascertaining the gain or loss derived from the sale of the stock with respect to which it is issued, the cost of each share (or when acquired prior to March 1, 1913, the fair market value as of such date) will be the quotient of the cost (or such fair market value) of the old shares of stock, divided by the total number of the old and new shares.

"Information on file in this office discloses that the cost to you of the stock of the W. Beckers Aniline & Chemical Works from which you received stock dividends amounting to $650,000 and from which you received liquidating dividends in the years 1917 and 1918, was $325,000. Therefore, in determining the profit from liquidation the cost price of the stock purchased represents the entire cost to be divided by the total number of the old and new shares of stock.

"Since the cost of the stock of $325,000 was used to reduce the amounts received in liquidation, your taxable income was properly determined.

"Your claims will, therefore, be rejected."

VIII. Both of the aforesaid claims for refund were officially rejected on July 20, 1927, and no part of the said additional taxes for 1917 and 1918 has ever been refunded to plaintiff.

IX. If it is held that the basis for computing the taxable gain on the sale of the stock should be increased by $650,000 and that the amount of the gain should be correspondingly decreased, then judgment should be for the plaintiff in the amount of $86,617.57 for the year 1917, and $63,650 for the year 1918, with interest on both amounts at the rate of 6 per cent per annum from July 19, 1922, to the date of the judgment.

X. If it is held that the cost of the stock to the plaintiff of $325,000 is the proper basis for computing the taxable gain on the sale of the stock, then judgment should be for the defendant.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff purchased in 1915 stock of the W. Beckers Aniline & Chemical Works of the value of $325,000. In 1916 the plaintiff received from the corporation a stock dividend of the value of $325,000, and in 1917 another stock dividend of the value of $325,000 was declared by the corporation. In 1917 the plaintiff sold his entire holdings in the corporation for $1,419,583.50, receiving a cash payment in 1917 of $891,250 and $528,333.50 in 1918. In 1922 the Commissioner of Internal Revenue assessed against the

plaintiff additional taxes amounting to $159,517.57 for 1917 and $429,856.78 for 1918. In computing gain and profit realized from the above transaction the commissioner followed article 1547, regulations 45 (1920 edition), as follows:

"ART. 1547. *Sale of stock received as dividend.*—Stock in a corporation received as a dividend does not constitute taxable income to a stockholder in such corporation, but any profit derived by the stockholder from the sale of such stock is taxable income to him. For the purpose of ascertaining the gain or loss derived from the sale of such stock, or from the sale of the stock with respect to which it is issued the cost (used to include also, where required, the fair market value as of March 1, 1913), of both the old and new shares is to be determined in accordance with the following rules:

"(1) Where the stock issued as a dividend is all of substantially the same character or preference as the stock upon which the stock dividend is paid, the cost of each share of both the old and new stock will be the quotient of the cost, or fair market value as of March 1, 1913, if acquired prior to that date, of the old shares of stock divided by the total number of the old and new shares.

"(2) Where the stock issued as a dividend is in whole or in part of a character or preference materially different from the stock upon which the stock dividend is paid, the cost, or fair market value as of March 1, 1913, if acquired prior to that date, of the old shares of stock shall be divided between such old stock and the new stock, or classes of new stock, in proportion, as nearly as may be, to the respective values of each class of stock, old and new, at the time the new shares of stock are issued, and the cost of each share of stock will be the quotient of the cost of the class to which such share belongs divided by the number of shares in that class.

"(3) Where the stock with respect to which a stock dividend is issued was purchased at different times and at different prices, and the identity of the lots can not be determined, any sale of the original stock will be charged to the earliest purchases of such stock (see article 39), and any sale of dividend stock issued with respect to such stock will be presumed to have been made from the stock issued with respect to the earliest purchased stock, to the amount of the dividend chargeable to such stock."

The additional assessment of $159,517.57 for the taxable year 1917 was paid in part by crediting overassessments of $10,500 and $62,400 found to be due the plaintiff for 1915

and 1916. The balance of the additional assessment, to wit, $86,617.57, was paid in cash and under protest. The additional assessment of $429,856.78 for 1918 was paid under protest to the collector July 19, 1922.

If the plaintiff is entitled to recover, the amount of the judgment should be $150,267.57, with interest, i. e., overpayments for 1917 of $86,617.57, and for 1918, $63,650. The plaintiff insists that he is entitled to recover the above sums under the provisions of the revenue acts of 1917 and 1918 and the established regulations of the commissioner then applicable to computing gain and profit realized from the sale of stock as this stock was acquired and sold. In the brief of plaintiff the contention is stated as follows:

"Under the *statutory provisions applicable to the taxation of such a profit*, as originally and correctly interpreted by the regulations of the Treasury Department, the basis of the computation of the profit was $975,000 (*i. e.*, the aggregate of the original cost plus the amounts at which the stock dividends were returnable as income under the *separate and distinct provisions in those same acts with respect to the taxation of stock dividends*). The profit was the difference between that amount and the total selling price of $1,419,583.50, or, $444,583.50."

Except for the decision of the Supreme Court in the case of *Eisner* v. *Macomber*, 252 U. S. 189, wherein it was held that stock dividends could not under the Constitution be taxed as income for the year in which received, the plaintiff's argument would be sustainable. The revenue acts of 1916 and 1918 taxed stock dividends as income of the taxable year in which received. The commissioner in formulating regulations to carry the acts into effect, prior to the decision in *Eisner* v. *Macomber* (*supra*), adopted a basis for computing gain and profit realized from the sale of such stock, predicated upon the difference between the stock's value for income taxation and the purchase price received by the owner for it. The correctness of this regulation is not challenged. Stock taxed on the basis of income value was manifestly to be accorded the value upon which income taxes had been assessed when it became essential to determine gain and profit accruing from the sale of the same stock; otherwise double taxation would follow. The mere statement of

this fact demonstrates the soundness of the regulations of 1917 and 1918. In 1920, however, when the commissioner audited the returns for 1917 and 1918 and made his determination of plaintiff's tax liability, the Supreme Court had held the statute taxing stock dividends to be unconstitutional. Such stock received as a dividend was, therefore, not subject to income taxation at the time distributed, and the commissioner eliminated from plaintiff's net income for the years 1917 and 1918 the above stock dividends as taxable income for those years, leaving only the ascertainment of the gain and profit realized by the plaintiff from the sale of all the stock herein involved. The regulations of the commissioner covering a transaction similar to the one in issue, promulgated at a time when stock dividends were taxable as income no longer, in so far as wording was involved, remained precisely applicable, and the commissioner promulgated the regulations heretofore cited (article 1547, *supra*) to meet the situation. These regulations, in our opinion, accomplish substantially the precise result obtained by the application of the regulations of 1917 and 1918, set out as an appendix to this opinion. In determining the additional tax which the plaintiff seeks to recover, the commissioner followed the regulations promulgated after the decision in *Eisner* v. *Macomber*, *supra*, which regulation was, in our opinion, a proper interpretation of the revenue acts of 1916 and 1918; the plaintiff's original stock was acquired for a cash outlay of $325,000. This was the cost to him of his entire holdings, and from the selling price received this sum was deducted. Section 2 (a) of the revenue act of 1916 (39 Stat. 757) provided:

"* * * the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever: *Provided*, That the term 'dividends' as used in this title shall be held to

mean any distribution * * * by a corporation, * * * out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock of the corporation * * *, which stock dividend shall be considered income, to the amount of its cash value."

The revenue act of 1918 similarly defined taxable income, and also provided that the term "dividends" should include stock dividends. The Supreme Court in *Eisner* v. *Macomber*, *supra*, held the statute unconstitutional in so far as it required the inclusion in taxable income of the stock dividend, and, on page 212, said:

"It is said that a stockholder may sell the new shares acquired in the stock dividend; and so he may, if he can find a buyer. It is equally true that if he does sell, and in doing so realizes a profit, such profit, like any other, is income, and so far as it may have arisen since the Sixteenth Amendment is taxable by Congress without apportionment."

Profit realized from the sale of stock is concededly taxable, and it is difficult to perceive wherein the computation of the commissioner in ascertaining the taxable profit in this case is in anywise erroneous or illegal. The revenue acts of 1916 and 1918 impose a tax upon gains and profits arising from sales or dealings in property, real or personal, or gains or profits and income derived from any source whatever. This provision of the statute was not affected by the decision of the court in *Eisner* v. *Macomber*, and the language clearly authorized the collection of the tax here in question upon the sale by the plaintiff of his stock. It is true that section 31 (a) of the revenue act of 1916 (40 Stat. 337), defined the term "dividends" as including stock dividends and set up a rule for the measurement of the value of stock dividends as income, and the regulations of the commissioner responded to the legislation. The *Eisner* v. *Macomber case* rendered the whole proceedings as to the inclusion in income of the cash value of stock dividends invalid, but in so doing it may not be said that Congress released from taxation gains or profits derived from sales or dealings in property and from any source whatever, or that the commissioner was forestalled under the revenue acts later in force from promulgat-

ing regulations consistent with law, forming a correct basis for the ascertainment of gains and profits derived from sales of stock, dividends, or otherwise. The statutes relied upon by the plaintiff gave legislative value to stock received as a dividend for income taxation. The question of gain and profit from the sale of stock remained undisturbed, and while in this particular instance the effect of the commissioner's regulations may result eventually in the payment of substantially the same amount of tax as Congress did impose under the revenue acts of 1916 and 1917 upon stock dividends, because the plaintiff's stock dividends were free distributions, nevertheless it is not to be asserted that in all instances a similar situation would prevail. Beyond doubt plaintiff's investment is represented by the single cash expenditure of $325,000, and, following the sale of all his stock, he had accumulated in cash the difference between his cash investment and what he received when the stock was sold. The profit measured by the difference between the cost of the original stock and the sales price of that stock and the shares received as a stock dividend was none the less taxable income because the statutes held invalid attempted to tax the stock dividend at the time it was received. After the decision in the *Macomber case* the situation with reference to the taxation of gains and profits was the same as if the statutes had never undertaken to tax a stock dividend. *Norton* v. *Shelby County*, 118 U. S. 425, 442.

In view of this record it is difficult to perceive wherein under the revenue acts plaintiff may claim a deduction from the sales price of a value fixed by the terms of an act which the Supreme Court held to be unconstitutional.

The petition will be dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

APPENDIX

"By sections 2 (a) and 31 (a) of the income-tax act of September 8, 1916, as amended, taxable income includes stock dividends paid by a corporation in 1916 or subsequent years out of its earnings or profits accrued since March 1,

1913, to the amount of the earnings or profits so distributed, * * *

"For the purpose of ascertaining under the income-tax act the gain or loss derived from the sale of stock or other property, its cost, or if acquired before March 1, 1913, its fair market price or value as of March 1, 1913, is evidently the basis to be sought. Such basis once found, the problem is resolved into a matter of subtraction. To avoid unnecessary complication 'cost' is used herein to include also, where required 'fair market price or value as of March 1, 1913.'

"For the purpose, then, of ascertaining the gain or loss derived from the sale of stock of a corporation received as a dividend, or from the sale of the stock in respect of which such dividend was paid, the cost of such stock is to be determined in accordance with the following rules: * * *

"(3) In the case of stock received as a dividend in 1916 or subsequent years out of surplus earnings or profits accrued since March 1, 1913, the cost of each share is the valuation at which it was returnable as income, as shown by the transfer of surplus to capital account on the books of the corporation, usually its par value.

"(4) In the case of the stock in respect of which any stock dividend was paid as described under (3), the cost of each share is its original cost, regardless of any stock dividend."

T. D. 3052 provided:

"The following applications of the decision of the Supreme Court of the United States in the case of *Eisner* v. *Macomber* in the determination of the taxability of dividends declared by corporations are published for the information and guidance of internal revenue officers and others concerned: * * *

"6. The profit derived by a stockholder upon the sale of stock received as a dividend is income to the stockholder and taxable as such, even though the stock itself was not income at the time of its receipt by the stockholder. For the purpose of determining the amount of gain or loss derived from the sale of stock received as a dividend or of the stock with respect to which such dividend was paid, the cost of each share of stock (provided both the dividend stock and the

Syllabus

stock with respect to which it is issued have the same rights and preferences) is the quotient of the cost of the old stock (or its fair market value as of March 1, 1913, if acquired prior to that date) divided by the total number of shares of the old and new stock."

T. D. 3059 provided:

"In accordance with the recent decision of the Supreme Court of the United States in the case of *Eisner* v. *Macomber* (T. D. 3010), holding that a stock dividend is not taxable income to the stockholder, articles 1545, 1546, and 1642 of Regulations No. 45 are hereby revoked, and article 1547 is amended to read as follows:

"'ART. 1547. *Sale of stock received as dividend.*—Stock received as a dividend does not constitute taxable income to the stockholder, but any profit derived by the stockholder from the sale of such stock is taxable income to him. For the purpose of ascertaining the gain or loss derived from the sale of such stock, or from the sale of the stock with respect to which it is issued, the cost (used to include also, where required, the fair market value as of Mar. 1, 1913), of both the old and new shares is to be determined in accordance with the following rules:

"'(1) Where the stock issued as a dividend is all of substantially the same character or preference as the stock upon which the stock dividend is paid, the cost of each share of both the old and new stock will be the quotient of the cost, or fair market value as of March 1, 1913, if acquired prior to that date, of the old shares of stock divided by the total number of the old and new shares.'"

NORTHWESTERN BARB WIRE CO. v. THE UNITED STATES

[No. K-183. Decided June 2, 1930]

On the Proofs

Income and profits tax; collection after expiration of waiver; sec. 278 (d), revenue act of 1926.—Where there has been a timely assessment, and collection is made within six years thereafter and subsequent to enactment of the revenue act of 1926, section 278 (d) thereof permits collection notwithstanding the same

is made after the expiration of the period prescribed in duly executed waivers.

The Reporter's statement of the case:

Mr. Benjamin B. Pettus for the plaintiff. *Mr. Edward Clifford* and *Colladay, Clifford & Pettus* were on the brief.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant. *Mr. Charles F. Kincheloe* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation organized under the laws of the State of Illinois, and has its principal office and place of business at Sterling, Illinois.

II. Plaintiff on March 30, 1918, filed with the collector of internal revenue at Chicago, Illinois, its return of income and profits taxes for the calendar year 1917 and duly paid the tax shown thereon.

III. On October 19, 1922, the Commissioner of Internal Revenue having examined claimant's said return, determined additional taxes on 1917 to be due in the sum of $7,481.37. He assessed said amount on the November, 1922, assessment list.

IV. On February 1, 1923, the plaintiff and the commissioner entered into an agreement in writing under the provisions of section 250 (d) of the revenue act of 1921, whereby the period within which a determination, assessment, and collection of plaintiff's income and profits taxes for the year 1917 was indefinitely extended.

V. On April 11, 1923, the Commissioner of Internal Revenue promulgated Mim. 3083 (published in Cumulative Bulletin II–1, p. 174) reading as follows:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., April 11, 1923.

Unlimited waivers for 1917 income taxes held to expire April 1, 1924.

To collectors of internal revnue, internal revenue agents in charge, and others concerned:

The form of waiver now in use extends the time in which assessments of 1917 income and excess profits taxes may be

made to one year from the date of signing by the taxpayer. Inasmuch as there are many waivers on file signed by taxpayers containing no limitation as to time in which assessments for 1917 may be made, all such unlimited waivers will be held to expire April 1, 1924.

D. H. Blair, *Commissioner*.

VI. Thereafter on January 9, 1924, the plaintiff and the commissioner entered into another agreement in writing, whereby it was agreed that the period within which a determination, assessment, and collection of plaintiff's 1917 income and profits taxes might be made was extended for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation was extended by any waivers already on file with the bureau, within which the assessment of taxes may be made for the year or years mentioned.

On November 22, 1924, the plaintiff and the commissioner entered into another agreement in writing, whereby it was agreed that the period within which a determination, assessment, and collection of plaintiff's 1917 income and profits taxes might be made was extended for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by section 277 (b) of the revenue act of 1924, or by any waivers already on file with the bureau.

VII. The collector of internal revenue at Chicago, Illinois, having threatened to issue distraint warrants to enforce collection of said additional taxes, the plaintiff on May 13, 1927, under protest paid to said collector the sum of $9,530.37, representing taxes of $7,481.37 for 1917 and interest thereon of $2,049.00.

VIII. Thereafter on September 28, 1927, plaintiff filed with the collector of internal revenue its claim for refund of said additional taxes and interest on the ground that that sum was illegally collected because said collection was made more than five years from the date of filing plaintiff's return and subsequent to the expiration of the period or any extension of said period agreed upon by the commissioner and the taxpayer.

IX. The Commissioner of Internal Revenue rejected said claim of refund on September 28, 1928.

X. No suit or other proceeding for the collection of the amount here involved was begun within five years from the filing of plaintiff's tax return for 1917, or within the period fixed by the waivers herein referred to.

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

This is a suit to recover $7,481.37, additional tax paid for 1917, together with interest thereon of $2,049, making a total of $9,530.37, together with interest from May 13, 1927, the date of payment.

Plaintiff claims that the amount was collected after it was barred by the statute of limitation as extended by certain written consents between it and the Commissioner of Internal Revenue.

Plaintiff's return for the calendar year 1917 was filed March 30, 1918. The five-year period for assessment and collection of any tax for 1917 would have expired on March 30, 1923, but on February 1, 1923, plaintiff and the commissioner entered into a consent in writing extending the period of limitation for assessment and collection of the tax for 1917. Other consents were executed, the last one of which extended the period of limitation for determination, assessment, and collection for 1917 to April 1, 1926. The assessment of the additional tax in controversy was made in November, 1922, but collection was not made until May 13, 1927, nearly fourteen months after the expiration of the period provided in the written consents. The collection, however, was made within six years after the date of the assessment in November, 1922. Plaintiff insists that the waiver was a binding contract which was not modified in any way by the provisions of the revenue act of 1926, 44 Stat. 9, and that the commissioner was, therefore, compelled to make collection on or before April 1, 1926, in order for the same to be legal.

The defendant contends that assessment of the tax having been timely made and the statutory period, as extended by

the waiver, not having expired upon the passage of the revenue act of 1926, the commissioner was authorized by that act to make collection at any time within the six years after the assessment.

But for the fact that the assessment in this case was made prior to the enactment of the revenue acts of 1924 and 1926, the question of limitation before the court in *Florsheim Brothers Drygoods Company, Ltd.*, v. *United States* and *White* v. *Hood Rubber Company*, 280 U. S. 453, decided February 24, 1930, would be identical. But, in view of the provisions of section 278 (d) of the revenue act of 1926, that where the assessment of any income or profits tax has been made, whether before or after the enactment of that act, such tax may be collected within six years after the assessment of the tax or prior to the expiration of time for any collection agreed upon in writing by the commissioner and the taxpayer, we think it is clear that collection on May 13, 1927, was proper. In *Florsheim Brothers Drygoods Co., Ltd., supra*, the court said:

"The Government contends that the 'Income and Profits Tax Waivers' executed by the corporations were waivers by them of the statutory period for another year; that while these waivers were still in force and while the corporations' liability was thus still alive, the revenue acts of 1924 and 1926 were passed, increasing the period for collection to six years after assessment; that these acts are applicable to the cases at bar; and that, since the collections were made within six years after the assessments, they were timely made. The corporations insist that the 'waivers' were not merely waivers extending the statutory period, but were binding contracts which limited the time in which the commissioner could assess and collect the taxes; and that no change in the law made after the date of the contracts and enlarging the time for collection can affect their rights. They urge that the 1924 and 1926 acts did not purport to extend the periods thus limited by contract; and that, if construed as extending such periods, the provisions of these acts are unconstitutional. They concede that, in the absence of contract, a legislature may constitutionally lengthen or shorten the period in which a right may be enforced by legal proceedings.

"We are of opinion that the contention of the Government must prevail. The waivers executed by the parties were not contracts binding the commissioner not to make the assess-

Syllabus

ments and collections after the periods specified. At the time when the waivers were executed, the commissioner was without power under the statute to assess or collect the taxes after the statutory period, as extended by the waivers. A promise by the commissioner not to do what by the statute he was precluded from doing, would have been of no significance. The waivers do not purport to contain such a promise. *Bank of Commerce* v. *Rose*, 26 F. (2d) 365, 366; *Greylock Mills* v. *Commissioner*, 31 F. (2d) 655, 657. And obviously, the commissioner did not undertake to limit the power of Congress to extend the period of limitations, as consideration for the waivers. The instruments were nothing more than what they were termed on their face—waivers; and that was all to which the commissioner was authorized to consent."

In view of the provisions of section 278 (d) of the revenue act of 1926 making the provision with reference to the right of the Government to collect a tax timely assessed within six years after the date of assessment, even though such assessment was made before the enactment of that act, it is clear that the plaintiff is not entitled to recover. In fact plaintiff makes no claim that it is entitled to recover because the assessment was made prior to the enactment of the revenue act of 1926 but its claim is based entirely upon the fact that the commissioner was bound to collect within the period specified in the waiver. This question is entirely disposed of adversely to plaintiff's contention by the *Florsheim* and *Hood cases*.

Plaintiff is not entitled to recover and the petition is dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

HAZELHURST OIL MILL & FERTILIZER CO. v. THE UNITED STATES

[No. 17453 Congressional. Decided June 2, 1930]

On the Proofs

Contract; threat of breach; duress; irreparable injury; status of tort; measure of damages.—(1) Where officials of the Government threaten to breach a contract unless the contractor accepts a proposed contract of settlement, and refusal to accept would

result in bankruptcy and irreparable injury, for which there would be no legal remedy, the acceptance of the settlement, having been under duress, will not be held to bar recovery of damages on the original contract for failure to carry out its terms.

(2) Though the acts of the Government officials might constitute tort, it merely prevents the Government in suit for breach of the original contract, from maintaining a defense based on the settlement which, on account of the act of duress, is void. The damages are not measured by the tort, but by the original contract, and are the difference between what the contractor would have received but for the breach, and what it did receive.

Same; expert testimony.—The testimony of qualified experts, when based upon their experience and knowledge of the subject, can not be excluded because it is their opinion, because it amounts to an approximation, or merely because it relates not to actual facts but to what might have occurred under conditions named.

The Reporter's statement of the case:

Messrs. Christie Benet and *George A. King* for the plaintiff. *Messrs. Don F. Reed, George R. Shields, Wade H. Ellis, Challen B. Ellis,* and *Benet, Shand & McGowan* and *Hatch & Reed* were on the briefs.

Mr. Alexander Holtzoff, with whom was *Mr. Assistant Attorney General Charles B. Rugg,* for the defendant. *Mr. Assistant Attorney General Herman J. Galloway* was on the brief.

The court made special findings of fact, as follows:

I. On March 3, 1923, the Senate of the United States passed a resolution numbered 448, referring Senate bill numbered 4479, entitled "A bill for the relief of Rose City Cotton Oil Mill and others," to the Court of Claims, under the provisions of the act of Congress of March 3, 1911, designated as the Judicial Code. Plaintiff is one of the two hundred and eighty-five claimants named in said bill. Copies of said resolution and said bill are attached to the petition as Exhibits 1 and 2 and made a part hereof by reference.

II. Plaintiff is a corporation and since 1897 has been engaged in the manufacture of derivative products of cottonseed.

III. On October 8, 1917, the President of the United States, acting under the authority conferred upon him by the food and fuel control act, issued an Executive order or proclamation placing under license control of the United States Food Administration all dealers in cottonseed and manufacturers of cottonseed products, including this plaintiff. Plaintiff subsequently applied for and received a license to operate its plant from the United States Food Administration, numbered G–3143, dated November 1, 1917, which provided that the same should be revoked upon the failure, neglect, or refusal of plaintiff to comply at all times with any and all orders, rules, and regulations of the said Food Administration. Plaintiff complied at all times with each and every one of said orders, rules, and regulations, and operated its plant under said license and by sufferance of said Food Administration. A copy of the Executive order or proclamation organizing the United States Food Administration is attached to the petition as Exhibit 4, and made a part hereof by reference.

IV. On April 4, 1918, the War Industries Board, organized under the provisions of an act of Congress, formed a special section designated as the cotton-products section, to deal with linters, and appointed George R. James as chief of said section. On May 2, 1918, the said section fixed the price of all linters during the period from May 2, 1918, to July 31, 1919, at $0.0467 per pound f. o. b. point of shipment. The plaintiff was required during said period to cut a minimum of 145 pounds of linters from every ton of seed crushed. The plaintiff subsequently entered into a contract with the United States with respect to linters which it was to furnish to the Government, and said contract established the price which was to be paid for linters.

V. After the outbreak of the World War and during the period prior to May 2, 1918, plaintiff produced and sold on the open market mattress and munition type linters, but during the period from May 2, 1918, to July 31, 1919, the plaintiff and the other cottonseed crushers produced and sold linters only to the Du Pont American Industries, Inc., sole purchasing agents of the United States. This was done in accordance with the terms and provisions of contracts in

writing entered into between the plaintiff and the United States.

VI. Prior to August 28, 1918, the Du Pont American Industries, Inc., acted as the sole purchasing agents of the United States, its allies and associates in the World War, under an informal agreement with the Ordnance Department of the United States Army. On said date, said informal agreement was reduced to writing, and said agents undertook for a consideration to purchase all linters produced in the United States during the period ending July 31, 1919, and did so purchase from plaintiff. A copy of the written agreement between the Du Pont American Industries, Inc., and the Government of the United States is attached to the petition as Exhibit 6 and made a part hereof by reference.

VII. On September 7, 1918, the United States Food Administration, acting for and on behalf of the Government of the United States, issued its Circular No. 49, a copy of which is attached to the petition as Exhibit 8 and made a part hereof by reference. The said Food Administration fixed the price which plaintiff and all the other cottonseed crushers were to pay for cottonseed; the price at which plaintiff and all the other cottonseed crushers were to sell cottonseed oil, cottonseed meal, and cottonseed hulls; the maximum freight allowance, the maximum operating cost per ton of seed crushed, and the maximum profit per ton of cottonseed crushed and converted, to apply for the season ending July 31, 1919. This schedules of prices fixed by the United States through its agencies, the Food Administration and the War Industries Board, and affecting the prices of cottonseed and the crushing of the same and the disposition of the products thereof, was known and spoken of as the stabilization scheme of the Food Administration. Plaintiff had no voice in fixing the price to be paid for the cottonseed, nor in the fixing of the price of derivative products, nor in the freight allowance, nor in the operating costs and profit. Plaintiff complied at all times with all of the provisions of said circular.

VIII. On or about September 28, 1918, the Du Pont American Industries, Inc., acting for and on behalf of the Government of the United States, sent to plaintiff a printed form of contract with directions to execute and return the same. Said contract covered the purchase of all linters then in possession of plaintiff and all linters to be produced by it during the season ending July 31, 1919, and named the price of $0.0467 per pound. Plaintiff protested as to the cancellation clause contained in the said contract to George R. James, chief of the cotton and cotton products section of the War Industries Board. George R. James advised plaintiff to execute the contract as written, stating that he would attempt to have the cancellation clause therein stricken out in order to have the written contract conform with previous understanding. Plaintiff thereupon executed said contract, and carried out all the terms thereof and instructions of the Government with reference thereto. The said James had no connection with the Ordnance Department, and had no authority to act for it, and was not a party to the contract. A copy of said contract is attached to the petition as Exhibit 7 and made a part hereof by reference.

IX. Thereafter, on November 28, 1918, the plaintiff and all the other cottonseed-oil mills received a telegram from Mr. George R. James, chief of the cotton and cotton linters section of the War Industries Board, after consultation with representatives of the Ordnance Department and Du Pont American Industries, Inc. Said telegram was in words and figures as follows:

"You are requested to notify all of your cottonseed-oil mills to discontinue the cutting of munition linters and to reduce the cut to 75 pounds or less at the earliest possible moment. When reduction in cut is begun, an accurate record of seed crushed and linters produced should be made and preserved pending definite and final arrangement for the discharging of all obligations of the Government linter pool to the mills and the removal of all rules and restrictions now in force. This request is made to avoid as much as possible an obvious economic waste, and is at the suggestion of officials of the Ordnance Department. It is hoped that a prompt and definite plan for the settlement can be offered in a few days."

Plaintiff complied with said request and thereafter produced only linters of the specified type.

X. At or about the time of said notice of November 28, 1918, plaintiff and the other cottonseed crushers also received notice from the cotton and cotton products section of the War Industries Board, acting for the Government of the United States, that definite and final arrangements for the discharge of all obligations of the Government to the plaintiff and the other cottonseed crushers would be made and that a prompt and definite settlement would shortly be offered. After a conference with representatives of the Government on December 10, 1918, a linter committee of the Interstate Cotton Seed Crushers' Association, acting for and on behalf of this plaintiff and the other cottonseed crushers, submitted a final offer of settlement to the representatives of the Government for the adjustment of the obligations of the Government under the said contract, which offer of settlement provided that the United States would take up and pay for all linters on hand as of that date, and would also take up and pay for all linters to be produced thereafter to July 31, 1919, at a price which would net the producers $6.77 per ton of seed manufactured for the linters from such seed. Said offer was approved by the War Industries Board and the United States Food Administration. Copies of said offer and approvals are attached to the petition as Exhibits 9 and 10 and made a part hereof by reference. Said offer of compromise was rejected by the Ordnance Department, the other party to the contract.

XI. On or about December 21, 1918, the War Industries Board ceased to function, and the linter committee, representing this plaintiff and the other cottonseed crushers, was notified that all negotiations relative to the settlement of the obligations of the Government under the said contract must in the future be carried on with the Ordnance Department of the United States. On December 30, 1918, a final conference was held regarding the adjustment and settlement of the obligations of the Government to the cottonseed crushers in Washington between the linter com-

mittee and the representatives of the Ordnance Department, and a final determination between the parties was arrived at.

XII. On December 30, 1918, the officers representing the Government in final conference with the linter committee notified the cottonseed crushers and this plaintiff through said linter committee, that the Government would settle its obligations to the cottonseed crushers only by taking what linters were on hand, inspected, and tagged, amounting to about 270,000 bales, and would take only a part of the linters thereafter produced by the crushers from January 1, 1919, to July 31, 1919, not to exceed 150,000 bales, if so much remained on hand unsold at that date, the amount taken to be prorated among the mills.

At said time said officials representing the Government notified the cottonseed crushers and this plaintiff that unless they accepted such offer above referred to within one hour from the time it was made, or by 7 o'clock p. m. of the same day, that the Government of the United States would breach the contract of September 26, 1918, would refuse to accept or pay for any linters whatever, either those on hand, accepted, inspected, and tagged, or thereafter to be produced, and that plaintiff and other cottonseed crushers could seek their remedy in the courts.

XIII. On December 30, 1918, at the time the Government officials made a final statement to the linter committee of what they would do, there were numerous cottonseed crushers, as well as bankers, farmers, and others interested in the cottonseed-crushing industry, present in Washington, awaiting the outcome of the conference with the officials of the Government.

At 7 o'clock that evening the plaintiff and the other cottonseed crushers, preserving their protest against the Government's interpretation of the terms of the contract and the position taken by the Government officials based thereon, notified the officials of the Government that the cottonseed crushers yielded to the demand of the Government officials and would accede to the requirement of modification of "seller's contract of sale."

XIV. On December 31, 1918, plaintiff and the other cottonseed crushers received notice from the Ordnance Depart-

ment of the Army by telegram that the contract of September 26, 1918, was canceled. This telegram was in the following words and figures:

"WASHINGTON, D. C., *December 30, 1918.*

"Your contract for linters with Du Pont American Industries, agent for United States Ordnance Department, is canceled. Your committee has tentatively agreed upon a form of settlement contract. Reply Major Hawkins, contract section, procurement division."

On January 2, 1919, the plaintiff and the other cottonseed crushers received from the Du Pont American Industries, Inc., sole purchasing agents of the United States, a printed form of settlement contract embodying the verbal agreement between the representatives of the crushers and the Ordnance Department of December 30, 1918. Accompanying said printed contract was a copy of a letter written by the Ordnance Department to the Du Pont American Industries, Inc., stating *inter alia* that—

"8. If any producer declines to execute such instrument, the Ordnance Department will authorize you to decline to accept from such producer any linters whatever, and the United States will reimburse you for any proper expenditures and costs incurred or resulting by reason of such action on your part."

This letter, including the paragraph above quoted, was prepared by representatives of the Government and counsel for the plaintiff and the other crushers acting jointly. Paragraph 8 was inserted at the request of and with the consent of the counsel for the crushers, who desired the same settlement to be made by all the crushers, so that none of the crushers would be in a position to get a more favorable settlement or settlements differing from those that the crushers would get who were represented by the crushers' committee and by its counsel. Under date of December 31, 1918, the plaintiff and defendant, by its agent, Du Pont American Industries, Inc., executed in writing a settlement contract, which is attached to the petition as Exhibit 11 and is made a part hereof by reference, and which recites *inter alia* the following preamble:

"Whereas the parties hereto entered into a contract, dated September 26, 1918, designated as seller's contract of sale,

and being purchase contract No. 3143, for the purchase of cotton linters for use in the conduct of the war; and

"Whereas the conditions have changed since the execution of the said contract, which render it desirable that the same should be modified; and

"Whereas the buyer under said contract has served notice on the seller that the buyer would, on January 1, 1919, cancel said contract under the provisions contained therein relating to cancellation; and

"Whereas a dispute thereupon arose between the buyer and the seller as to the right of the buyer to cancel said contract, the said dispute growing out of the question as to whether or not the war has terminated; and

"Whereas a further dispute has arisen between the buyer and the seller as to what is the measure of damages provided by said contract for the loss, if any, to the seller, which would be caused by the cancellation of said contract; and

"Whereas contracts similar to the said contract have been entered into by the buyer with practically all concerns engaged in the crushing of cottonseed and the production of linters, as more particularly appears in said contract; and

"Whereas it is for the best interests of the United States to arrange for a settlement of said disputes by a modification of said contract, under which modification the buyer will be required to receive and pay for a less quantity of linters than is provided for by the terms of the contract aforesaid.

"Now, therefore, in lieu of cancellation of said contract, and in consideration of the premises and the mutual agreements herein contained, the said parties have agreed, and by these presents do agree, with each other, to the following modification of the contract aforesaid."

Said contract provides for changes in the quantity of linters to be produced by the plaintiff and purchased by the United States, and the prices to be paid therefor, and concludes with the following release to the Du Pont American Industries, Inc., the duly authorized agent of the United States:

"Upon the execution of this agreement, and upon compliance with its terms by the buyer, the seller releases the buyer from any and all claims or demands in law or in equity arising or growing out of any change, modification, or interruption in purchases, deliveries, and/or quantities of linters prescribed in the seller's contract of sale above referred to."

Reporter's Statement of the Case

All the other cottonseed crushers mentioned in Senate bill No. 4479 executed contracts as of the same date, of the same effect and import, and containing the foregoing provisions.

Said contract was approved and signed also by Col. R. P. Lamont, contracting officer, and by Hon. B. Crowell, Assistant Secretary of War. The following memorandum was, on January 2, 1919, signed, respectively, by Senator Benet, counsel for the plaintiff, and by Major Hawkins and Major Gelshenen:

"I am familiar with the settlement described under date of January 2, by R. P. Lamont, colonel, Ordnance Department, regarding linters, and am able to state that this settlement is one which would be approved by Mr. B. M. Baruch, chairman of the War Industries Board, and by Mr. George R. James, chairman of the Linters Section, War Industries Board, both of whom are now out of the city and not expected to return for some time."

XV. Plaintiff and the other cottonseed crushers continued during the period from January 1, 1919, to May 31, 1919, to manufacture mattress-type linters in accordance with the terms of the settlement contract. No protest was, at any time, made by the plaintiff or any other crushers as to the signing of the settlement agreement of December 31, 1918, until after May 31, 1919, when an attempt was made before the Board of Contract Adjustment of the War Department to set aside the settlement agreement. On June 29, 1919, the plaintiff and the other crushers filed their claims with said board. The board denied the claimants relief. On appeal, the Secretary of War affirmed the action of the board.

XVI. The plaintiff produced from seed crushed during the period from January 1, 1919, to and including July 31, 1919, certain linters over and above those taken and paid for by the United States, and expended certain storage charges upon linters produced during said period, for which it has not been paid by the United States. The second contract dated December 31, 1918, did not provide that storage charges should be paid for by the United States, but on the contrary, provided that "the seller, where it has space to do so, will store the same at buyer's risk and without charge for storage." The plaintiff crushed during the period January 1, 1919, to August 1, 1919, 7,632 tons of linters, for which it is

entitled to $6.77 per ton, or $51,668.64. The plaintiff incurred expense for storage charges in the sum of $1,961.95; insurance $367.25; handling, $109.50, by reason of the failure of defendant to accept and take linters in accordance with the original agreement. The United States paid the plaintiff the sum of $26,491.34, and the plaintiff received for linters sold to others the sum of $1,812.26, making in all the sum of $28,303.60. The amount paid the plaintiff was its proportional share under the contract of December 31, 1918. The amount unpaid is $25,803.74.

XVII. Plaintiff and the other cottonseed crushers were under the orders and regulations of the Food Administration to maintain the price of cottonseed and cottonseed products theretofore fixed by the Food Administration, and to continue the manufacture of such products for the entire crop year of 1918–19. The production of linters is a necessary part of the manufacturing process of extracting oil and other valuable contents from cottonseed. Linters can not be bought by the crushers as a raw material, but are purchased as a part of and attached to the cottonseed. The crushing of cottonseed is a seasonal business, due to the fact that seed will not keep, but owing to the high oil content, will, if kept in large quantities for any length of time, heat and spoil.

XVIII. There are no claims, liquidated or unliquidated, existing in favor of the United States against plaintiff which the United States can set off or counterclaim against plaintiff, and there has been no delay or laches by plaintiff in presenting or prosecuting its claim, and the same is not barred by any statute of limitations; and the said claim is in amount and character the same, with respect to the Hazelhurst Oil Mill & Fertilizer Co., as that mentioned in Senate bill numbered 4479, entitled "A bill for relief of Rose City Cotton Oil Mill and others," referred to this court by Resolution Numbered 448.

XIX. On December 30, 1918, the plaintiff had on hand 1,033 bales of munition linters made under Government regulations, which had been inspected, accepted, and tagged by the Du Pont American Industries, Inc., agents of the United States, and which were unsalable except to the Government having been specially cut, and being unsuited

for ordinary commercial purposes. At the same time plaintiff had on hand 6,068 tons of cottonseed which it had bought under Government regulations at $70.00 per ton; also 66,743 pounds of cottonseed oil, 330 tons of cottonseed meal, and 142 tons of cottonseed hulls. The plaintiff was also committed to purchase from its agents, to which it had advanced funds, cottonseed to the value of $112,608.00, which cottonseed had been purchased by said agents at the fixed price of $70.00 per ton. Plaintiff was also obligated to individuals and banks in the total sum of $415,105.43, or about double the amount of its capital and surplus, which obligations it had incurred to finance the purchases above set forth and upon reliance on the Government keeping its obligations. If defendant breached its contract for linters by not paying anything further thereon, as it threatened to do, the plaintiff and the other cottonseed mills would have been unable to continue to pay $70.00 per ton for cottonseed, being the price fixed by the Food Administration, and the plaintiff was advised by the Food Administration that in that event it (the Food Administration) would not continue the stabilization plan and would not guarantee the price further. The result would have been a crisis in the market of cottonseed and its derivative products. The short cut linters would have been unsalable and all other cottonseed products greatly depressed in value, and plaintiff would have been caused a loss in the aggregate of about $200,000; its capital and surplus would have been consumed; it would have been unable to meet its obligations; it would have gone into bankruptcy and its business that had been built up in the course of twenty years would have been entirely lost; and plaintiff was induced to sign the settlement contract by fear of the consequences of a refusal, as above set forth.

XX. The Government, in accordance with the contract of September 26, 1918, paid for all of the munition linters produced by the plaintiff up to and including December 31, 1918, when the contract was terminated by mutual agreement and a settlement contract executed by the parties as hereinabove stated.

The court decided that plaintiff was entitled to recover $25,803.74.

GREEN, *Judge*, delivered the opinion of the court:

The Hazelhurst Oil Mill & Fertilizer Company is one of 285 claimants whose claims are based on similar facts and which have been referred to this court by a Senate resolution. The findings show fully the proceedings which have taken place before the case came into this court. It is not necessary, however, that we should go into any details in relation thereto, for the reason that counsel for both parties to the action have agreed that the case may be submitted and judgment rendered as if it were an ordinary action commenced against the defendant, of which the court had general statutory jurisdiction. Accordingly, the case will be so treated, the claimant will be referred to in the opinion as the plaintiff and the Government as the defendant, and we shall discuss in the opinion only such facts as will be necessary for the decision of the case.

Treating the case as an ordinary suit, we find it is one which is brought to recover damages alleged to have been sustained by reason of a breach of contract between plaintiff and defendant, under which contract the defendant agreed to purchase cotton linters of the plaintiff at a stated price. The defendant answers that all of the claims arising out of or under the contract, upon which suit is brought, were settled by a subsequent contract and agreement between plaintiff and defendant with which the defendant has fully complied. To this answer the plaintiff replies alleging that the contract of settlement is void, having been obtained through duress. These matters constitute the issues in the case.

In considering the facts of the case it will be observed that the findings contain no reference to Federal statutes, presidential proclamations, and presidential orders which created the United States Food Administration and the War Industries Board for the reason that this court takes judicial notice thereof.

The original contract between plaintiff and defendant was made during the great World War and was subject to

all of the authorized proceedings and regulations of the Government made for the purpose of effectively carrying on and sustaining the part of the United States in that great conflict. With these preliminary statements we take up the facts upon which the decision of the court turns.

It appears without dispute that in 1918 plaintiff entered into a contract with the agents of the Government of the United States for the production of cotton linters and their sale to the United States during the years 1918 and 1919. Linters are the short ends of staple cotton which adhere to the seed after the lint is taken off for the manufacture of cloth. They are the best known basis for nitrocellulose, which is used for the manufacture of high explosives.

In the spring of 1918 all cottonseed oil mills of the United States were placed under the direct control of the United States Food Administration and the War Industries Board. This control was brought about by the action of the War Industries Board in fixing the price of all linters on hand on May 2, 1918, and to be produced thereafter during the period ending July 31, 1919, at $0.0467 per pound f. o. b. points of location or production, and at the same time requiring that all mills should thereafter produce a minimum of 145 pounds of linters per ton of seed crushed, as compared with a normal production of commercial linters in peace times of about 75 pounds of linters per ton of seed. When 75 pounds or less of linters are produced from a ton of cottonseed, the product is referred to as commercial linters, and when more than 75 pounds of linters are produced from a ton of cottonseed, they are called munition linters. Munition linters of 145 pounds cut have no value for commercial purposes.

As a part of this control, all mills were required to sell all linters produced during the season of 1918–19 to the Du Pont American Industries, Inc., sole purchasing agents of the United States, and were not allowed during said period to sell any linters to any other person whatsoever. Heavy penalties were prescribed for the failure to obey the orders of the Government.

Another factor of this control was the action of the Food Administration whereby the prices of cottonseed and of all

the derivative products thereof other than linters, the gross operating cost to the mills, the maximum freight allowance, and the profit to be made upon each ton of seed crushed during the period from August 1, 1918, to July 31, 1919, were fixed by governmental action. An operating license was required for each mill for the continuance of business which could be revoked on the failure of the licensee to comply with the orders and regulations of the Food Administration.

Under this concerted plan of governmental agencies, as above set forth, all mills were required to pay the farmers $70 per ton for every ton of cottonseed purchased during the said period ending July 31, 1919, which included all seed produced from the entire cotton crop of the South for the season 1918–19, and to sell all products derived from the crushing of cottonseed at the prices as fixed by the Government.

Each of the mills subsequently received and executed a "Seller's Contract of Sale" containing the orders and regulations made in accordance with the above recitals, with which the mills complied, and by this contract the Government was bound to purchase at a specified price from the mills all linters produced during the period above named. This contract contained a cancellation clause giving the Government the option to terminate the contract "in the event of the termination of the present war." The contract was not terminated or canceled in accordance with the terms thereof nor was any settlement ever offered to the mills under its provisions.

On November 28, 1918, hostilities having been ceased by reason of the armistice of November 11, 1918, the Government directed the mills to discontinue the manufacture of munition linters and revert to the manufacture of commercial linters, which the plaintiff and the other mills did at once. The Government also notified all mills that a definite and final arrangement for discharging the obligations of the United States would be made in a few days. Numerous conferences were held between the linter committee, representing the plaintiff and the other mills, and the officials of the Government with reference to the situation.

Opinion of the Court

The cotton-products section of the War Industries Board ceased to function and was disbanded on December 21, 1918, and its activities with reference to linters were taken over by the Ordnance Department of the Army and the mills so notified.

On December 30, 1918, the Ordnance Department, acting through General Pierce, notified the mills, through the linter committee, that the Government would take only the linters then held by the various mills, inspected and tagged, amounting to 270,000 bales, and would take only a part of the linters to be produced between January 1, 1919, and July 31, 1919, the amount to be taken at July 31, 1919, to be prorated among the mills, and unless the mills accepted this proposition as a settlement within one hour, by 7 p. m. of the same night, the United States would breach the contracts of September 26, 1918, and refuse to accept any linters whatever, either theretofore or thereafter produced.

The nature of the results that would have followed in the way of loss and damage if plaintiff refused to accede to the demands of the defendant, made through the Ordnance Department, is set out fully in Finding XIX.

Counsel for defendant strenuously contend that the testimony which was taken on behalf of plaintiff with reference to the results which would have followed a breach of defendant's contract in the manner threatened, is simply a guess, or at best merely the estimate of the witnesses who gave it, and is incompetent. The objection merits serious consideration; but after such consideration, we have concluded that it is not well taken. These witnesses were men of long experience in the business concerning which they testified and their competency as experts in the matters concerning which they gave testimony was fully established. As in all cases with expert witnesses, their testimony was simply their opinions in the matter based upon their experience and knowledge of the subject and the testimony can not be excluded on that ground. Neither can it be rejected on the ground that it is not exact and at best, so far as the figures go, is only an approximation. The real objection to the evidence, if there be any, is that it is not given with reference to

actual facts which are shown to have occurred, but with reference to what the witnesses in their judgment say would have occurred had the second contract not been entered into. No precedents can be found for our guidance in any exactly similar case, but we think the general principles with reference to expert and opinion testimony apply. If the evidence is received, and we think it should be, it is because it is the best that is obtainable upon the subject, or perhaps it might be said the only evidence that can be obtained. It would be idle to tell the plaintiff that proof should be produced of the injury which would result to it if defendant carried out its threats in order to make out a case of duress and then say that the only evidence that could be obtained in the way of proof was inadmissible. We have therefore used it in making up our findings. It may be somewhat inexact but it is not necessary that it should be exact in order to show the great amount of damage that plaintiff would have received.

It is urged on behalf of defendant that the plaintiff is precluded from any recovery by the language used in the opinion of the Supreme Court in the case of the *Hartsville Oil Mill* v. *United States*, 271 U. S. 43, the plaintiff therein being a corporation which was in the same position as this plaintiff, but the language of the Supreme Court upon which the defendant relies we think was intended to apply only to the evidence in that case, which was far from being complete with reference to the extent of the plaintiff's injuries and the nature thereof.

In the *Hartsville case*, *supra*, the Supreme Court, after severely criticizing the conduct of defendant's officials, said:

"Appellant must prove the probable injury which it would have suffered from the threatened refusal of the Government to carry out its contract, and that fear of that loss was the effective cause of its executing the settlement contract. Any inference that the business of manufacturing and distributing cottonseed products would have been disastrously affected, would avail appellant nothing because it does not appear what the consequences to its own business and finances would have been.

"The findings establish that on December 30, 1918, there were in the hands of manufacturers 270,000 bales of linters; but it does not appear what proportion of them, if any, were

in the hands of appellant. There is no finding with respect to the amount of cottonseed or cottonseed products in the hands of the manufacturers. There is no finding with respect to the nature or extent of the commitments of the manufacturers for the purchase of seed, or as to the nature or extent of the loss which appellant would have suffered if on December 30, 1918, the Government had refused to go forward with its contract; or that the legal damages for such breach of contract would not have been adequate to compensate for its loss. There is no finding that appellant was induced to sign the settlement contract by fear of the consequences of a refusal to sign."

This want of evidence has now been supplied. There are findings as to the number of bales of linters in the hands of the plaintiff, and of the amount of cottonseed and cottonseed products that it had on hand. There is a finding with reference to the extent of its commitments for the purchase of seed, and as to the extent of the loss which plaintiff would have suffered if, on December 30, 1918, the Government had refused to go any farther with its contract, and finally a finding that legal damages for such breach of contract would not have been adequate to compensate for its loss and that plaintiff was induced to sign the settlement contract by fear of the consequences of the refusal to sign.

Counsel for defendant cite cases which show that it has often been held that fear that financial loss will result if a threat is carried out is not sufficient by itself and alone to constitute duress, but in most of these cases it will be found that the threat which was made was simply to exercise some legal right and this, however serious the effect might be upon the other party, never constitutes duress. In the other cases where threats to perform some unlawful act have influenced the action of the other party, it still has not been held to be duress unless irreparable injury would follow the execution thereof. But in this case the threat was made not simply to cancel the contract so far as future operations were concerned but to refuse to pay for the linters which had already been tagged and accepted—a course of action for which the Government can not present even the shadow of a legal right. The Government officials also must have known the effect of the course which the

Opinion of the Court

Food Administration proposed to take in event the settlement was not executed. Possibly the Government officials who threatened to disregard the contract for the purchase of linters were not responsible for the acts of the Food Administration, but they knew of the effect their action would have upon the Food Administration and were proposing to take advantage of it. The situation with reference to prices of cottonseed, cottonseed oil and meal, linters, and other derivative products in that era of rapid depreciation of values was like that of a row of tenpins—when one was knocked down, all the others fell with it. The findings show that if the plaintiff and the other mills had refused to accede to the demands of defendant's agents and they had carried out their threats, the result would have been a commercial crisis in the business of buying cottonseed and manufacturing various products therefrom.

If the prices of these products were not sustained by the Government and all the mills were compelled to throw the accumulated products on the open market, values, as shown by the evidence, would have immediately collapsed, and the loss to plaintiff, as the findings show, would have been around $200,000—about the amount of its total capital and surplus.

If the loss on the linters had been all that would have resulted from the Government breaching its contract it could be properly said that plaintiff had a complete remedy at law in its suit to recover the price agreed upon in the original contract. But this was only a small part of the loss, and for the other losses which would have been sustained, as we have shown above, plaintiff had no legal remedy. It could not bring suit against the defendant to recover losses sustained by reason of the failure of the Food Administration to maintain the stabilization plan and for the depression in prices of all of the mill's products. It had no remedy except upon the linters. Above all it had no remedy for its bankruptcy and the loss of its business. As the findings show, its damage would have been irreparable.

We think these acts of the Government officials constituted duress which would render the settlement void. If

they did not, we are at a loss to know what would constitute duress outside of physical compulsion. In this view we think we are fully supported by the authorities. In *Maxwell* v. *Griswold*, 10 How. 242, a Government official had illegally assessed certain duties against imported goods, and the owner was unable to obtain possession of the goods without making payment thereof, and the court said:

"The payment of the increased duties thus caused was wrongfully imposed on the importer, and was submitted to merely as a choice of evils. He was unwilling to pay either the excess of duties or the penalty, and must be considered, therefore, as forced into one or the other by the collector, *colore officii*, through the invalid and illegal course pursued in having the appraisal made of the value at the wrong period, however well meant may have been the views of the collector. The money was thus obtained by a moral duress, not justified by law, and which was not submitted to by the importer, except to regain possession of his property withheld from him on grounds manifestly wrong."

In *Swift Co.* v. *United States*, 111 U. S. 22, 28, 29, it appeared that the plaintiffs were manufacturers of matches upon which revenue stamps were required, and were entitled to a commission from the Government on account of making their own dies for the stamps so used, but the Government refused to make payment of the amount due to them except in stamps, and the Supreme Court said with reference to the transaction:

"The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with under such pressure has never been regarded as a voluntary act, within the meaning of the maxim, *volenti non fit injuria*."

In support of the position taken, the court referred to numerous cases, saying:

"In *Close* v. *Phipps*, 7 M. & Gr. 586, which was a case of money paid in excess of what was due in order to prevent a threatened sale of mortgaged property, Tindal, C. J., said: 'The interest of the plaintiff to prevent the sale, by submitting to the demand, was so great, that it may well be said the payment was made under what the law calls a

species of duress.' And in *Parker* v. *Great Western Railway Company*, 7 M. & Gr. 253, the wholesome principle was recognized that payments made to a common carrier to induce it to do what by law, without them, it was bound to do, were not voluntary and might be recovered back. Illegal interest, paid as a condition to redeem a pawn, was held in *Astley* v. *Reynolds*, 2 Stra. 915, to be a payment by compulsion. This case was followed, after a satisfactory review of the authorities, in *Tutt* v. *Ide*, 3 Blatchf. 249; and in *Ogden* v. *Maxwell*, 3 Blatchf. 319, it was held that illegal fees exacted by a collector, though sanctioned by a long-continued usage and practice in the office, under a mistaken construction of the statute, even when paid without protest, might be recovered back, on the ground that the payment was compulsory and not voluntary."

In *Robertson* v. *Frank Bros. Co.*, 132 U. S. 17, 24, customs duties collected in the threat of an onerous penalty were held to be involuntary and the Supreme Court said:

"In our judgment the payment of money to an official, as in the present case, to avoid an onerous penalty, though the imposition of that penalty might have been illegal, was sufficient to make the payment an involuntary one. It is true that the thing done under compulsion in this case was the insertion of the additional charges upon the entries and invoices; but that necessarily involved the payment of the increased duties caused thereby, and in effect amounts to the same thing as an involuntary payment."

We think the plaintiff has presented a stronger case than those referred to in the quotations from the opinions of the Supreme Court. The threatened action of the defendant's officers was not only illegal but a more serious injury would result if the threat was carried out than in any of these cases and that injury would be irreparable.

The cases cited by the Supreme Court in the *Hartsville Mill case*, *supra*, while sustaining the decision of the Supreme Court in that case are not, in our opinion, applicable to the facts shown in the case at bar. In *Silliman* v. *United States*, 101 U. S. 465, 470 (the case first cited), it appeared that the plaintiffs had leased some barges to the Government, and the department informed plaintiffs that it would not comply with the provisions of the original contracts unless the plaintiffs would submit to material alterations against their interests and to the advantage of the Government, and the Supreme Court said:

"The claimants could have sued for each instalment of rent as it became due, or when the Government returned the barges they could have sued, as they now sue, for the whole amount due under the original charter parties. They had a full and complete remedy by suit against the Government in the Court of Claims for the enforcement of their rights under those contracts."

In the case at bar we have held upon the facts that plaintiff did not have a full and complete remedy.

The reasonable limits of an opinion forbid our taking up the other cases cited in the *Hartsville Mill case* but in each and all of them the facts are readily distinguished from those in the case at bar and we can not think that the Supreme Court intended to hold that the facts now presented to this court would not constitute duress.

It may be argued that if the acts of the Government officials were sufficient to constitute duress they also constituted tort, and that no suit can be brought against the defendant for torts committed by its officials whether authorized or unauthorized. We think the answer to this is plain. In the case at bar the acts of the Government officials have been ratified by the Government by insisting in this suit upon the benefits which accrued therefrom, but even so, if the cause of action was based upon a tort, it is probable that no relief could be granted. But the suit is not brought upon the tort but for a breach of the contract. The tort, if there was one, was merely an incident which caused the plaintiff to agree to the second contract and now entitles it to repudiate that agreement. The tort merely prevents defendant from maintaining its defense. The damages will not be measured by the tort. If they were so measured, they might include punitive as well as actual damages. The original contract is the yardstick for measuring the plaintiff's damages and the difference between what it would have received under that contract and what it actually did receive is the amount thereof.

The second contract being void, it is clear that the original contract was breached and the next question to be determined is the amount of plaintiff's damages.

Plaintiff was paid for the linters produced up to January 1, 1919. The controversy in the case arises over those pro-

duced from that date to and including July 31, 1919, when the original contract ended. Assuming the original contract to be in full force, the findings show that from January 1, 1919, to August 1, 1919, the plaintiff crushed 7,632 tons of cottonseed for which it was entitled to $6.77 per ton under the rules prescribed by the War Industries Board and the contract of sale made with the Government purchasing agent. This amounts to $51,668.64. The Government paid for linters produced during this period $26,491.34, and plaintiff also received from other parties for linters $1,812.26, or a total of $28,303.60. The plaintiff is entitled to recover the difference between the amount received and the price it was agreed to be paid in the original contract. In addition thereto we think the plaintiff is entitled to recover storage, insurance charges, and handling charges as alleged in its petition. That the plaintiff incurred these costs is shown by the evidence. The second contract made no provision for payment of storage charges, but on the contrary provided that "the seller, where it has space to do so, will store the same at buyer's risk and without charge for storage." But we have held that the second contract was void and plaintiff was not bound by the terms thereof. The original contract made no provision for storage, insurance charges, etc., but it recited that the Government had bought the linters f. o. b. cars at point of production, and we think there was an implied agreement that the Government should take the linters as fast as they were produced. Probably this matter was not mentioned in the contract because under the war conditions that prevailed the cottonseed mills could not produce linters fast enough to satisfy the Government needs. The provision in the second contract was evidently intended to annul this implied agreement, but, like the remainder of the second contract, it was of no force and effect.

It will be observed in this connection that abstract equity is accomplished by the conclusions above stated. The Government will pay only the amount which it would have paid under its original contract, plus some incidental charges which were probably caused by the Government having ceased to have any use for linters and therefore permitting them to remain in the hands of plaintiff instead of taking

them promptly as it may be presumed was done while the war continued. In other words, the Government is simply required to carry out its original contract which, without the slightest excuse in law or equity, its officials violated.

Under the foregoing conclusions the plaintiff is entitled to recover $25,803.74 and judgment will be entered accordingly.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

JOSEPH P. NOLAN v. THE UNITED STATES

[No. K-463. Decided June 2, 1930]

On Motion to Dismiss Petition

Jurisdiction; relief act of March 1, 1929; effect of title.—The act of March 1, 1929, is for the relief of those enumerated in the title thereof, and not of one who is neither a seaman nor a judgment creditor for wages earned.

Statutory construction; effect of title.—See *Garrett* v. *United States*, *ante*, p. 304.

Same; reports of congressional committees.—See *Garrett* v. *United States*, *ante*, p. 304.

The Reporter's statement of the case:

Mr. Assistant Attorney General Charles B. Rugg for the motion to dismiss. *Messrs. Assistant Attorney General Herman J. Galloway* and *Dan M. Jackson* were on the brief.

Mr. John K. White for the plaintiff.

Petitioner's allegations are stated in the opinion.

WILLIAMS, *Judge*, delivered the opinion of the court:

This matter comes up on defendant's motion to dismiss plaintiff's petition and the ground that the court is without authority to hear and adjudicate the case.

The petition alleges:

"That plaintiff is an attorney and counselor at law, duly admitted to practice in the courts of the State of New York,

and having an office for the transaction of business in the city, county, and State of New York, and at the times hereinafter mentioned acted as the proctor in admiralty for the Black Star Line.

"That at all the times hereinafter mentioned the Black Star Line was a corporation organized and existing under the laws of the State of Delaware, and having an office for the transmission of business in the city, county, and State of New York, and engaged in the steamship business.

"That at the present time said Black Star Line is not functioning, is not engaged in business, and, as far as plaintiff is aware, or has been able to ascertain, has held no meetings of stockholders or directors, and is without any officers or directors to conduct business.

"That early in the year 1921 the Black Star Line, desiring to increase its tonnage, sought to procure an additional ship or ships and entered into a contract with one Rudolph Silverstone, doing business as the New York Ship Exchange. Various negotiations were had through the said Silverstone, to whom the Black Star Line had advanced certain sums of money for the purpose of acquiring a ship or ships, and said Silverstone had, as part of his employment for the Black Star Line, made a bid to the U. S. Shipping Board for the SS. *Orion.*

"That thereafter the Black Star Line consulted this plaintiff with respect to said matters, and advised plaintiff that the sum of $12,500.00 had been deposited with the U. S. Shipping Board as an earnest of the bid made for the SS. *Orion*, but that the said bid could not be accepted because the U. S. Shipping Board required an additional sum of $10,000.00 to be deposited, which sum of money the Black Star Line was not in a position to advance, and requested the plaintiff to loan and advance the sum of $10,000 and pay the same for account of the Black Star Line to the U. S. Shipping Board as additional earnest money on the bid of the Black Star Line for the SS. *Orion.*

"Plaintiff, after aiding the Black Star Line in an endeavor to raise the sum of $10,000.00, which efforts of the Black Star Line were unsuccessful, arranged a loan in the sum of $10,000.00 with the International Finance Corporation, which latter corporation insisted upon a corporation note in the sum of $11,000.00, secured by a surety company bond, for the purpose of the advancement of said sum of $10,000. Plaintiff then procured from the Black Star Line its promissory note in the sum of $11,000.00, which plaintiff endorsed, and also secured from the Massachusetts Bonding Company a bond guaranteeing the payment of the said $11,000.00, and

plaintiff indemnified the Massachusetts Bonding Company for the execution of said bond.

"The International Finance Corporation then paid to plaintiff the sum of $10,000.00 and plaintiff then drew his check to the order of the U. S. Shipping Board, dated August 30th, 1921, and had the same certified, and said check was deposited with the U. S. Shipping Board as additional earnest money on the bid of the Black Star Line for the purchase of the SS. *Orion*.

"That thereafter the said promissory note of the International Finance Corporation became due, but the bid of the Black Star Line for the SS. *Orion* had not been acted upon by the U. S. Shipping Board, and plaintiff paid the additional sum of $1,000.00 to the International Finance Corporation for the renewal of the said note.

"That thereafter the U. S. Shipping Board refused the bid of the Black Star Line for the SS. *Orion*.

"That thereafter the said promissory note became due and payable, and the same was paid by the Massachusetts Bonding Company to the International Finance Corporation, and this plaintiff, in turn, under the indemnity agreement given to the Massachusetts Bonding Company, paid over to the said Massachusetts Bonding Company the sum of $11,818.47.

"That at the time plaintiff agreed with the Black Star Line to obtain the said sum of $10,000 and pay the same to the U. S. Shipping Board as additional earnest money on the bid of the Black Star Line for the SS. *Orion*, it was agreed between the Black Star Line and this plaintiff that if the bid of the Black Star Line to the U. S. Shipping Board for the SS. *Orion* was not accepted that the sum of $10,000.00, so advanced by this plaintiff would be returned to this plaintiff, and also all sums expended, or liabilities incurred, by plaintiff in connection therewith; and it was further agreed that if the U. S. Shipping Board did accept the bid of the Black Star Line for the SS. *Orion* that from the first freight moneys received by the Black Star Line for cargo laden, or to be laden, on board the SS. *Orion* there would be returned to this plaintiff the said sum of $10,000.00, and also all sums expended, or liabilities incurred in connection therewith.

"That except for the foregoing agreement, providing for the method of the return of said $10,000.00 to this plaintiff no other security or collateral has at any time been received by the plaintiff.

"That the $10,000.00 obtained as above set forth from the International Finance Corporation, as well as the bond of the Massachusetts Bonding Company, guaranteeing payment of the said loan, were made solely upon the credit and

responsibility of this plaintiff, and on his application, and as a personal matter to this plaintiff, wholly separate and apart from the Black Star Line or any of its officers.

"That thereafter demand was made upon the U. S. Shipping Board for the return of the said sum of $10,000.00, as well as the return of the said sum of $12,500.00, representing the total earnest money deposited with the U. S. Shipping Board, but the U. S. Shipping Board failed and refused to pay the said sum of $12,500.00 to the Black Star Line, but first deducted its expenses in connection with the said bid of the Black Star Line for the SS. *Orion*, and then, over the objection of this plaintiff, covered the said sum of $10,000.00 into the Treasury of the United States, and over the objection of the representatives of the Black Star Line covered the said $12,500.00, less the expenses of the U. S. Shipping Board in connection with the said bid for the SS. *Orion*, into the Treasury of the United States.

"That the plaintiff is justly entitled to said sum of $10,000.00 actually advanced to the U. S. Shipping Board by plaintiff for account of the Black Star Line, as well as for the sum of $1,818.47, the amount paid over and above the sum of $10,000.00 in liquidation of the said promissory note, and in addition thereto the sum of $1,000.00 advanced by plaintiff on behalf of the Black Star Line to the International Finance Corporation for the renewal of the said obligation.

"That this suit is brought under authority of the act of Congress approved March 1st, 1929, being private bill No. 459—70th Congress (Senate bill No. 229), entitled:

"'An act for the relief of certain seamen and any and all persons entitled to receive a part or all of money now held by the Government of the United States on a purchase contract of steamship *Orion* who are judgment creditors of the Black Star Line (Incorporated) for wages earned';"

and under § 145 of the Judicial Code.

"That the plaintiff is the sole owner of this claim, and has made no assignment of transfer thereof, or of any part thereof, or interest therein; that the plaintiff is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; that the plaintiff has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to any revolution against the Government of the United States."

The title of the act clearly and definitely designates the persons for whose relief the special act of Congress was

intended—"certain seamen and any and all persons entitled * * * who are judgment creditors of the Black Star Line (Incorporated) for wages earned."

The plaintiff is not a seaman and he is not a judgment creditor of the Black Star Line (Inc.) for "wages earned," consequently he is clearly excluded from the benefits of the act.

The plaintiff urges that there is no rule of law holding that the title of an act of Congress excludes from the benefits of such act others who are not specifically mentioned in the title of the act. That is true, but it is also true that the courts give to the title of acts due consideration in the construction of statutes.

Chief Justice Marshall, in *United States* v. *Fisher*, 2 Cranch 358, 386, said:

"Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."

In *United States* v. *Palmer*, 3 Wheaton 610, 631, the Supreme Court, speaking again through Chief Justice Marshall, said:

"The title of an act can not control its words, but may furnish some aid in showing what was in the mind of the legislature."

In *Holy Trinity Church* v. *United States*, 143 U. S. 457, the court said:

"It will be seen that words as general as those used in the first section of this act were by that decision limited, and the intent of Congress with respect to the act was gathered partially at least from its title. Now, the title of this act is, 'An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia.' Obviously the thought expressed in this reaches only to the work of the manual laborer, as distinguished from that of the professional man. No one reading such a title would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain. The common understanding of the terms 'labor and laborers' does not include preaching

and preachers; and it is to be assumed that words and phrases are used in their ordinary meaning. So whatever of light is thrown upon the statute by the language of the title indicates an exclusion from its penal provisions of all contracts for the employment of ministers, rectors, and pastors."

That the plaintiff is not included among those whose relief Congress had in mind is conclusively shown by the report made by the committee of the Senate having the bill in charge:

"The claimants are judgment creditors of the Black Star Line (Inc.), a Delaware corporation, which maintains an office for the transaction of business in the State of New York. The claimants were sailors on a ship known as the *Kanawah*. Most of them were common seamen who secured their judgments in an action brought in their behalf in the District Court of the United States for the Southern District of New York on December 16, 1921. The judgment amounted to $12,303.35. The applicant, Garrett, was the engineer on the said vessel, whose claim for services covered a long period of time while protecting the vessel in foreign waters. This judgment was obtained on the 28th day of January, 1925, in the Supreme Court of the State of New York, New York County, and amounts to $5,836.64 with interest.

* * * * *

"It has been suggested that because certain agents of the Black Star Line (Inc.), which actually forwarded the money to the Shipping Board on behalf of the Black Star Line (Inc.), should be considered in connection with the application of these funds. Such a position can not in any way be considered seriously. The New York Ship Exchange which forwarded the money, did so, as the correspondence shows, unequivocally as the agent of the Black Star Line (Inc.). Whether it sent its own check or the check of the Black Star Line (Inc.) was a matter absolutely immaterial. There was no claim that it was sending its own money and there is nothing whatever in the correspondence which would justify any possible inference that it was not the money of the Black Star Line (Inc.). There is nothing even which could suggest either in this instance or in the case of Nolan that the money was even being loaned to the Black Star Line by the forwarders, but even if the money were being loaned it belonged to the Black Star Line (Inc.), once the loan had been made and the lenders could not look

to that fund for reimbursement, but would have a general claim against the borrower. But there is nothing in the case whatever to justify even a belief that there was any loan of these moneys."

Reports of committees of Congress made at the time a bill is reported from a committee to the Congress for consideration are treated by the courts as having great and generally controlling weight in the construction of statutes enacted on the strength of such reports.

In *Binns* v. *United States*, 194 U. S. 486, 495, the Supreme Court said, "we have examined the report of the committees of either body with a view of determining the scope of statutes passed on the strength of such reports."

In *McLean* v. *United States*, 226 U. S. 374, 380, under a special act referring the claim to this court, the court said:

"She asserts that the prompting of the act was to repair an injustice done to Major McLean, and, to support the assertion, she refers to the report of the committee of the House of Representatives and that of the Senate, Fifty-third Congress. The reference is justified (*Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 333; *Northern Pacific Co.* v. *Washington*, 222 U. S. 370, 380) and gives support to the contention that the circumstances which preceded and provoked Major McLean's resignation appealed to Congress, and to redress its consequences Congress authorized his reinstatement, and, to make it complete, passed the act of February 24, 1905."

In *Duplex Co.* v. *Deering*, 254 U. S. 443, 474, 475, this rule was reaffirmed and extended:

"Reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. *Binns* v. *United States*, 194 U. S. 486, 495. And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage."

It is manifest from the title of the act, from the committee reports in Congress when the act was under consideration, and from the language of the act itself that the plaintiff is excluded from the provisions of the act and can not maintain his suit in this court.

The motion to dismiss is therefore allowed. The petition is dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

ATLANTIC REFINING CO. v. THE UNITED STATES

[No. C-1249. Decided June 16, 1930]

On the Proofs

Requisition charters, Fleet Corporation; admitted balance.—Judgment given for amount withheld by the defendant on account of its claim that the plaintiff was otherwise indebted to the Government, as set out in counterclaim, *Atlantic Refining Co.* v. *United States*, C-978, decided December 2, 1929.

The Reporter's statement of the case:

Mr. Ira Jewell Williams for the plaintiff.

Mr. J. Frank Staley, with whom was *Mr. Charles F. Kincheloe*, for the defendant. *Mr. Assistant Attorney General Herman J. Galloway* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff, a Pennsylvania corporation, with principal office and place of business at Philadelphia, is and was engaged in buying, selling, and refining petroleum, oil, gasoline, fuel oil, and other products thereof, and for such purposes constructing, purchasing, maintaining, owning, and operating a fleet of tankers and other ships.

II. At all the times hereinafter mentioned plaintiff was the owner of and now owns five steam tankers known as *J. E. O'Neill*, *J. C. Donnell*, *Herbert L. Pratt*, *W. M. Irish*, and *W. M. Burton*. August 30, 1917, these tankers were under construction and were known, respectively, as hulls 143, 205, 144, 148, and 149. The *O'Neill*, *Pratt*, *Irish*, and *Burton* were under construction at San Francisco, California, and their construction was completed by the Bethlehem Shipbuilding Corporation. The *Donnell* was under construction at the Newport News Shipbuilding & Drydock Company at Newport News, Virginia.

III. Acting through the United States Shipping Board Emergency Fleet Corporation, the defendant, by virtue of the authority conferred on the President of the United States by the urgent deficiencies act of June 15, 1917, 40 Stat. 182, and by him delegated to said Fleet Corporation by Executive order dated July 11, 1917, duly requisitioned the tankers under construction and the materials therefor by order dated August 3, 1917.

IV. The defendant on January 1, February 6, February 25, and April 7, 1918, through the Fleet Corporation informed plaintiff in writing that the tankers heretofore referred to were about completed; that although final figures covering the cost of completing them were not available, it was estimated that the cost of completing the *O'Neill* would be about $640,000; the *Donnell*, about $800,000; the *Pratt*, about $1,170,000; the *Irish*, about $1,640,000; and the *Burton*, about $1,650,000.

V. The defendant, through its agent, required plaintiff to deposit the above-mentioned sums to be expended by defendant in the completion of the tankers. Pursuant to this demand and for the purposes stated, plaintiff deposited the sums mentioned with the defendant; the deposit in respect of the *O'Neill* being made January 2, the *Donnell* January 16, the *Pratt* February 7, the *Irish* April 12, and the *Burton* April 30, all in the year 1918. The total amount paid by plaintiff to defendant was $5,925,000.

VI. The tankers were completed January 10 and 22, March 1, May 2, and June 25, 1918, respectively, pursuant to the plans therefor, as modified by the defendant through the Fleet Corporation, at divers times subsequent to June 3, 1917; and the tankers were delivered on or about the dates of their completion by the defendant through the Fleet Corporation to plaintiff in accordance with requisition agreements and charters executed, respectively, for the ships by plaintiff and defendant. The defendant through the Fleet Corporation paid for the account of completing the tankers mentioned the total sum of $5,904,926.14. Deducting this amount from the amount of $5,925,000 deposited by plaintiff with the defendant for completing the tankers

leaves a balance due plaintiff by defendant of $20,073.86, no part of which has been paid.

The court decided that plaintiff was entitled to recover.

PER CURIAM: There is no controversy in this case as to the right of plaintiff to recover, nor as to the amount which is due it. Payment of the amount had been withheld by the defendant on account of its claim that the plaintiff was otherwise indebted to the Government in respect of the operation of these and other vessels by plaintiff under charter from the defendant.

This claim of indebtedness was set forth by the defendant in its counterclaim filed in a suit by this plaintiff, *Atlantic Refining Company* v. *United States*, C–978, decided December 2, 1929,[1] in which this court awarded the defendant judgment for $74,585.90.

Judgment in plaintiff's favor for $20,073.86 will be entered. It is so ordered.

COSMOS CLUB v. THE UNITED STATES

[No. H–218. Decided June 16, 1930]

On the Proofs

Taxes; social, sporting or athletic club; membership dues.—Where the predominant purposes of a club are educational and the advancement of its members in science, literature, and art, and its main activities are conducted with the view of accomplishing such purposes, and its social features are merely incidental thereto, its membership dues are not taxable under sec. 801, revenue act of 1921, or section 501, revenue acts of 1924 and 1926.

The Reporter's statement of the case:

Messrs. John F. McCarron and *George E. Hamilton* for the plaintiff.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. McClure Kelley* was on the brief.

[1] To be reported in subsequent volume.

The court made special findings of fact, as follows:

I. Plaintiff, a District of Columbia corporation, was incorporated December 13, 1878. The certificate of incorporation sets forth the particular objects and business purposes of the plaintiff, as follows:

"The particular objects and business of this association are the advancement of its members in science, literature, and art, their mutual improvement by social intercourse, the acquisition and maintenance of a library, and the collection and care of materials and appliances relating to the above objects, under the restrictions and regulations established in its by-laws."

II. During the period from February 6, 1923, to and including December 15, 1926, plaintiff paid a total of $26,-532.05 as taxes on dues and fees of its members as a result of a ruling on October 30, 1923, by the Commissioner of Internal Revenue that plaintiff was a social club within the meaning of the revenue acts of 1921, 1924, and 1926, imposing a tax on membership dues of social, sporting, or athletic clubs.

III. December 22, 1926, plaintiff filed a claim for refund of the entire tax paid on the ground that it is not a social, sporting, or athletic club within the meaning of the revenue acts or the regulations of the commissioner. April 30, 1927, the Commissioner of Internal Revenue rejected the claim for refund, adhering to his decision that plaintiff qualifies as a social, sporting, or athletic club within the meaning of section 801 of the revenue act of 1921 and section 501 of the revenue acts of 1924 and 1926.

IV. Section 1 of article 1 of the constitution and by-laws of plaintiff provides for the following classes of membership:

"This club shall be composed of men

"(*a*) Who have done meritorious original work in science, literature, or the fine arts;

"(*b*) Who, though not occupied in science, literature, or the fine arts, are well known to be cultivated in a specific department thereof;

"(*c*) Who are recognized as distinguished in a learned profession or in public service."

V. The by-laws provide for the appointment of certain committees to carry out the objects and purposes of the club, as shown in article 6 of the by-laws, as follows:

"There shall be a house committee composed of five members; a committee on the library, a committee on art and decoration, and a committee on entertainments, each composed of three members. The members of these committees shall be appointed by the board of management; shall hold office at the pleasure of the board, and shall perform their assigned duties under the supervision of the board. At least one member of the board of management shall be appointed a member of the house committee.

"The house committee shall have charge of furnishing supplies, engaging the services of employees, keeping the clubhouse in good order and repair, keeping the grounds in order, and enforcing the observance of the by-laws.

"The committee on the library shall have charge of the library and of the supply of literary works, periodicals, and newspapers. They shall keep a catalogue of the books belonging to the club, and shall record therein with every such work the time of its purchase or presentation.

"The committee on art and decoration shall have charge of all art exhibitions in the clubhouse and shall make recommendations to the board of management concerning the decorations of the house and the promotions of art in the club. All propositions relating to these subjects shall be referred to this committee for advice and report.

"The committee on entertainments shall arrange for and have charge of all lectures, concerts, receptions, and other entertainments which the club may hold for its members.

"The expenditures of the standing committee, and of such other committees as the board may find it necessary to appoint, shall be limited to such sums as the board of management shall appropriate, and the committees shall not incur indebtedness in excess of such appropriation. Their accounts shall be kept and audited in such manner as the board shall prescribe.

"The board of management shall designate the chairman of each standing committee and shall fill all vacancies occurring in these committees, provided that this rule shall not apply to the committee on admissions."

VI. Plaintiff's club buildings are located at the corner of Madison Place and H Street northwest, in Washington, D. C., and are described as follows:

Dolly Madison house.—Lot 804, square 221, containing 4,282 square feet.

The basement contains a heating plant, servants' quarters, shop, and storage rooms.

1st floor: Entrance, office, cigar store, coat room, and lounging rooms.

2d floor: Administrative offices, board room, and library.

3d floor: Eight bedrooms.

Attic: Storage space.

Main club building.—Lot 31, square 221, containing 5,761 square feet. Building covers about 5,200 square feet.

Basement: Commissary, ice plant, print shop, ice box, barber shop, servants' quarters, and heating plant.

1st floor: Reading and writing room, billiard room.

2d floor: Ten bedrooms.

3d floor: Ten bedrooms.

4th floor: Eight bedrooms, private dining room.

5th floor: Kitchen and main dining room.

Tayloe house and assembly hall; also known as Cameron house.—Lot 803, square 221, containing 12,193 square feet. Buildings cover about one-half of lot.

Basement: Storage rooms.

1st floor: Kitchen, ladies' dining room. The assembly hall is connected with this floor by a corridor.

2d floor: Card room, parlors, and two sleeping rooms.

3d floor: House service quarters and five bedrooms.

4th floor: Five bedrooms and storage room.

The assembly hall has a floor space of 2,145 square feet. There are about two hundred permanent seats in it and chairs might be added so as to accommodate three hundred people.

The library has a floor space of about 816 square feet, the card room 648 square feet, and the billiard room 1,504 square feet. There is ample room for eight tables in the card room and the billiard room has five regular tables.

The old stable on the Tayloe property was converted into an assembly hall, which has a seating capacity of about three hundred.

This is a one-story building. Ample space is provided for serving meals in the main dining room on the fifth floor of the main building, the ladies' dining room on the first floor of the Tayloe property and dining rooms adjoining this.

The card room is about 18 feet by 36 feet. It is available for the use of the members whenever wanted.

There is also a billiard room about 32 feet by 47 feet and contains five tables.

Annual reports are made showing the number of meals served in each of the dining rooms. The main dining room on the fifth floor is closed during the summer.

VII. The local general assessment for the years 1927, 1928, on the above properties is as shown below:

Square	Lot	Square feet	Land	Improvements
221	804	4,282	$278,330.00	$33,000.00
221	31	5,761	172,830.00	87,500.00
221	803	12,193	304,825.00	34,700.00
Total		22,236	755,985.00	155,200.00

VIII. The club has a pool and billiard room which is used by about ten members each day. There is a billiard tournament each year participated in by about fifteen members. It also has a small card room for members. The club has no gymnasium, swimming pool, tennis court, golf course, or ball room and no dances are held in the club. In addition to its library and dining room, it provides a reading room and a periodical room and lounge where there are newspapers.

IX. The library of the club has a floor space of about 816 square feet and there are about 4,500 volumes in it containing general works in science, art, history and literature and works of reference and sets of standard authors. The club also has a large collection of books that is housed in the Library of Congress as it does not have sufficient room for them in its quarters. The library contains about 1,400 volumes of fiction and drama.

Reporter's Statement of the Case

X. The club building contains valuable paintings owned by the club or loaned to it, and a representative list of them is as follows:

Title	Artist	Owner
Tantalian Castle	Peter Taft	Cosmos Club.
Fujiyama	Hirshi Yoshida	Cosmos Club.
Landscape	Delancy W. Gill	Cosmos Club.
Mountain Scene		
Sunset with Boat	Henry B. Snell	Cosmos Club.
Indian Summer Day	Max Weyl	National Gallery.
Clearing up in the Berkshires	J. H. Moser	Cosmos Club.
Portrait—J. W. Powell	E. H. Miller	Cosmos Club.
Breakers	J. H. Moser	Loaned.
Moonlight	J. H. Moser	Loaned.
Lake Como	Ercole Calvi	Loaned.
The Old Homestead	J. H. Moser	Loaned.
Dolly Madison	C. Y. Turner	Cosmos Club.
Portrait—Col. Garrick Mallery	E. F. Andrews	Cosmos Club.
Tolstoy	Ossip Perelma	Loaned.
Landscape	Max Weyl	Cosmos Club.
Return of the Fleet	Francis D. Millet	Loaned.
A Woodland Pool	W. H. Holmes	Cosmos Club.
Bronze of F. D. Millet	St. Gaudens	Cosmos Club.
Fired On	Frederick Remington	Cosmos Club.
Tyrolese	John S. Sargent	Loaned.
Deer	J. A. Oertel	Cosmos Club.
Landscape	Delancy W. Gill	Loaned.
Landscape—Sheep	F. Brissot	Loaned.
Ship at Sea	Jos. G. Tyler	Cosmos Club.
Battle with the Cliffs	W. T. Richards	Cosmos Club.
Landscape—Cows	Martin	Cosmos Club.
Portrait—Charles Darwin	G. Mercier	Cosmos Club.
Portrait—Abraham Lincoln		Cosmos Club.
Chinese Painting (large, very old)		
Interior of Lavardin Church	Jerone Uhl	Loaned.
Dolly Madison	E. F. Andrews	Cosmos Club.
Walt Whitman		Cosmos Club.
Portrait—C. Y. Turner		Cosmos Club.
Portrait—Burnett		Cosmos Club.
Portrait—Simon Newcomb		Cosmos Club.
Portrait—H. W. Wiley		Cosmos Club.
Portrait—Theodore Gill		Cosmos Club.
Portrait—J. R. Proctor		Cosmos Club.

XI. The plaintiff club fosters science, literature, and art. Its membership produces works in science, literature, and art, and entertains men distinguished in science, literature, and art. Many distinguished scientific and literary men are members of the club. Lectures on science, art, literature, and education are provided by the club on Mondays for its members. Such lectures are by men distinguished in the arts, science, literature, and education.

The club is a meeting place in Washington for men engaged in scientific activities in Washington and elsewhere. Such meetings are held in the club's assembly hall and often a luncheon is given at which scientific questions are dis-

cussed. During the World War the plaintiff club was the center of all the specialists who were invited from all the laboratories and universities of the country to come to Washington to help the Government, and conferences were held several times a day at the club by groups of those men. The club is known all over the world as a center for science, especially, and literature and art to a lesser degree.

There has been originated by members of the club and in the club scientific and natural organizations such as the conservation of natural resources, the national park system of preserving the natural parks of America, the protection of game by the Federal Government, and the movement against the chestnut blight which destroyed valuable forests.

Every scientific organization in Washington, biological, botanical, sociological, and medical, started in the plaintiff club and used the club for its meeting place until some of them became so large as to require their own buildings. A number of scientific organizations still meet in the assembly hall of the club. Organizations such as the Washington Academy of Science, the Biological Society, the Botanical Society, the Chemical Society, the Society of Electrical Engineers, the Washington Society of Engineers, the Geological Society, the Columbia Historical Society, the Philosophical Society, the Automotive Scientific and Mechanical Engineers, the Civil Engineers, and the Monday Evening Club meet in the club for the transaction of their business. A modest fee is charged these societies for the use of the assembly hall to cover largely the cost of heat, light, and cleaning the hall. The board room of the club is furnished free to the officers and committees of the above societies or any other scientific society that uses it.

XII. The predominant purposes of the plaintiff are educational and the advancement of its members in science, literature, and art, and its main activities are conducted with the view of accomplishing such purposes. The very few social features of the plaintiff club are but incidental to its predominant purposes as stated.

The court decided that plaintiff was entitled to recover, with interest.

Opinion of the Court

LITTLETON, *Judge*, delivered the opinion of the court:

The issue is whether the plaintiff is a social club within the meaning of section 801 of the revenue act of 1921, 42 Stat. 291, and section 501 of the revenue acts of 1924 and 1926, 44 Stat. 92. Those acts impose a tax of a certain percentage of any amount paid as dues or membership fees (where the dues or fees of an active resident annual member are in excess of $10 per year) to any social, athletic, or sporting club or organization; or as initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees (not including initiation fees) of an active resident annual member are in excess of $10 per year.

Article 4 of Treasury Regulations 43, part 2, revised, provides that "The purposes and activities of a club and *not its name* determine its character for the purpose of the tax on dues" and article 5 provides

"Any organization, which maintains quarters or arranges periodical dinners or meetings for the purpose of affording its members an opportunity of congregating for social intercourse, is a 'social * * * club or organization' within the meaning of the act, unless its social features are not a material purpose of the organization but are subordinate and merely incidental to the active furtherance of a different and predominant purpose, such as, for example, religion, the arts, or business."

Whether the dues or membership fees of a club or organization are subject to the tax as those of a social club within the meaning of the acts is primarily a question of fact. The facts in this case show that the predominant purposes of the plaintiff club were educational and for the advancement of its members in science, literature, and art, and that its main activities were conducted with the view of accomplishing such purposes. Its very few social features were but incidental to its predominant purposes.

Upon these facts plaintiff can not be held to be a social club within the meaning of the statutes and the regulations. *Aldine Club* v. *United States*, 65 C. Cls. 315; *Chemists' Club* v. *United States*, 64 C. Cls. 156; *Bankers Club of America* v. *United States*, and *Washington Club* v. *United States*, decided by this court February 10, 1930 [69 C. Cls. 121, 621].

Plaintiff is entitled to recover and judgment will be entered in its favor for $26,532.05, with interest from the dates of payments on the amounts aggregating this sum, as provided by law. It is so ordered.

WILLIAMS, *Judge*, and BOOTH, *Chief Justice*, concur.

This case was tried before WHALEY, *Judge*, was appointed. He therefore took no part in its decision.

GREEN, *Judge*, did not hear this case and took no part in its decision.

ELLING O. WEEKS, DOING BUSINESS AS WEEKS SUPER CARBURETOR CO., v. THE UNITED STATES

[No. H-515. Decided June 16, 1930]

On the Proofs

Excise tax; parts or accessories for automobiles; supercarburetor.—Plaintiff's supercarburetor, a device for more completely vaporizing the gas after it has left the carburetor, thus increasing the efficiency of internal-combustion engines, primarily designed for use on airplanes, but equally suitable for use upon any internal-combustion engine, and used on automobile and other engines, indifferently, *held* not subject to the excise tax on automobile parts or accessories.

Same; advertisement of one of several types as adapted for use on automobile engines.—The mere advertisement of one of several types of a certain device as adapted for use on certain models of a known make of internal-combustion engine extensively used in automobiles, where the proof is that said type was equally adapted for use on engines not used in automobiles, is not sufficient to make the manufacturer liable for the excise tax on the same or other types.

The Reporter's statement of the case:

Mr. Alex Koplin for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Arthur J. Iles* was on the brief.

Reporter's Statement of the Case

The court made special findings of fact, as follows:

I. Elling O. Weeks, doing business as Weeks Super Carburetor Company, during the times hereinafter mentioned, was and now is engaged in business, with his principal place of business located at Milwaukee, Wisconsin.

II. The Weeks supercarburetor is a vaporizer for increasing the efficiency of internal-combustion engines. It is a device for more completely vaporizing the gas after it has left the carburetor. It is attached to the intake manifold between the carburetor and the motor.

The Weeks supercarburetor is patented under Letters Patent No. 165045, issued by the United States Patent Office, for an apparatus for reatomizing fuel to be used for internal combustion. The device was developed by plaintiff while engaged in the operation of airplanes and was primarily designed for use on airplanes, but it was equally suitable for use upon any internal-combustion engine, when the manifold was of the same size.

The Weeks supercarburetor has been used on tractors and motors for mining, sawing wood, motors used for running mowers, baggage mules (which are motors with flat plates in front for pushing baggage trucks around), airplanes, and internal-combustion engines used in automobiles.

Taxes were paid on all the supercarburetors sold by plaintiff, regardless of the use to which they were put. Sales were made through distributors or agents.

Plaintiff made and sold this supercarburetor in various sizes and in more than one type. One of these types was adapted for use on the engine of certain models of the Ford automobile by being made in such form that it could be easily attached to the manifold of the engine of that model, but it was equally adapted for use on engines used for other purposes than as a motor for automobiles when the manifold was of the same size, and was so used. Plaintiff issued an advertisement showing how this type of the supercarburetor could be attached to the manifold of the Ford engine, and in the advertisement was a statement to the effect that the use of the supercarburetor would result in a much

greater mileage being obtained from a given quantity of gasoline used in the engine. It does not appear from the evidence how many of this type of carburetor were sold or to what engines they were attached. The other type or types and sizes were attached to gas engines used in a number of different kinds of machinery other than automobiles or trucks. The evidence does not show how they were attached to the gas engines upon which they were used, nor does the evidence show whether any of these types or sizes were sold to be attached to engines used in automobiles.

III. Plaintiff made and filed his manufacturer's excise-tax returns monthly for the period April, 1923, to February, 1926, inclusive, showing the amount of tax due thereon which was duly assessed on such returns by the Commissioner of Internal Revenue, and paid by plaintiff, for the months, in the amounts, and on the dates hereinafter set forth, as follows:

Period	Year	Month	Year	Page	Line	Amount	Date paid
Apr.	1923	June	1923	3	5	$76. 43	6/ 5/23
May		July		11	7	96. 15	7/ 7/23
June		Aug		5	4	84. 75	8/ 2/23
July		Sept		8	5	61. 20	9/ 5/23
Aug		Oct		9	4	58. 75	10/ 3/23
Sept		Nov		18	1	69. 49	11/ 7/23
Oct		Dec		12	4	125. 65	12/ 6/23
Nov		Dec		44	2	217. 24	12/28/23
Dec		Feb	1924	10	6	339. 78	2/ 7/24
Jan	1924	Mar		14	8	225. 35	3/ 7/24
Jan		Aug		19	0	5. 51	8/ 8/24
Feb		Apr		2	4	394. 96	4/ 3/24
Mar		May		14	5	402. 43	5/ 3/24
Apr		June		10	6	425. 18	6/ 5/24
May		July		4	2	433. 12	7/ 1/24
June		Aug		12	8	462. 60	8/ 5/24
July		Sept		4	5	198. 87	9/ 5/24
July		Nov		• 8	9	23. 98	11/10/24
Aug		Oct		3	1	217. 72	10/ 2/24
Sept		Nov		3	0	225, 32	11/ 3/24
Oct		Dec		2	7	278. 99	12/ 2/24
Nov		Jan	1925	4	6	360. 18	1/ 6/25
Dec		Jan		19	2	468. 55	1/31/25
Jan	1925	Feb		14	2	547. 64	2/27/25
Feb		Mar		13	7	587. 14	3/28/25
Mar		May		6	8	928. 72	5/ 4/25
Apr		June		3	3	740. 70	6/ 3/25
May		June		15	6	853. 17	6/29/25
June		July		12	8	770. 59	7/27/25
July		Aug		14	3	699. 19	8/28/25
Aug		Sept		15	0	611. 68	9/28/25
Sept		Oct		16	6	620. 70	10/27/25
Oct		Nov		14	4	599. 22	11/30/25
Nov		Dec		17	1	613. 45	12/ 3/25
Dec		Jan	1926	13	0	497. 87	1/29/26
Jan	1926	Mar		2	3	359. 10	3/ 1/26
Feb		Mar		13	9	270. 84	3/30/26

IV. On April 27, 1926, plaintiff filed his claim for refund #352322 of manufacturer's excise tax so paid on supercarburetors (vaporizers) for the period April, 1923, to February, 1926, inclusive, in the amount of $13,952.21, which was duly rejected by the Commissioner of Internal Revenue on September 9, 1926.

The court decided that plaintiff was entitled to recover $13,952.21, with interest.

GREEN, *Judge*, delivered the opinion of the court:

Plaintiff in this case is a manufacturer of a patented device intended to be attached to the manifold of carburetors used in connection with internal-combustion engines. The purpose of the device was to insure the more complete re-atomizing or vaporizing of the fuel used in such engines, thereby making it easier to start the engine and insuring more perfect combustion, by which the amount of power which might be obtained from the engine would be increased. The device was primarily designed for use on engines for airplanes, but is equally adapted for use on any kind of a combustion engine and was in fact used on tractors, motors for mining, sawing wood, motors used for running mowers, so-called baggage mules, and internal-combustion engines used on automobiles and trucks. Plaintiff made and sold this supercarburetor in various sizes and in more than one type. One of these types was adapted for use on certain models of the Ford automobile by being made in such form that it could be easily attached to the manifold of the engine of that model. Plaintiff issued an advertisement showing how this type of the supercarburetor could be attached to the manifold of the Ford car or the Ford engine wherever used, and in the advertisement was a statement to the effect that the use of the supercarburetor would result in a much greater mileage being obtained from a given quantity of gasoline used in the engine. This type was equally adapted for use upon any internal-combustion engine having a manifold of the same size as that used upon the Ford engine. It does not appear from the evidence how many of this type of carburetor were sold or to what engines they were attached.

The other type or types and sizes were attached to gas engines used in a number of different kinds of machinery other than automobiles or trucks. The evidence does not show how they were attached to the gas engines upon which they were used, nor does the evidence show whether any of these types or sizes were sold to be attached to engines used in automobiles.

The plaintiff paid a tax on all of the supercarburetors which he manufactured during the period in question in the case, and having filed a proper claim for refund, now sues to recover the amount so paid.

There are four matters which appear in the evidence and which taken together, we think, entitle the plaintiff to judgment: (First) the article sold was a special patented device for a special purpose; (second) it was not primarily designed for use upon automobiles; (third) it was equally adapted for use in connection with nearly every kind of gas engine and was in fact attached to and used on a large number thereof in different kinds of machinery other than automobiles; (fourth) plaintiff paid taxes on all of the sales of the supercarburetor regardless of the use to which it was put. We do not think the fact that one type of the supercarburetor was advertised as adapted for use on certain models of the Ford engine is sufficient to make the plaintiff liable for the whole or any of the tax, as the evidence shows that this type was equally adapted for use on other engines not a part of an automobile or truck, especially when the evidence fails to show how many of this type were so sold, or to what engines they were attached.

The case is in line with that of the *Milwaukee Motor Products, Inc.*, v. *United States*, 66 C. Cls. 295, and the decision is clearly controlled by the opinion in *Universal Battery Co.* v. *United States*, rendered by the Supreme Court May 26, 1930 [281 U. S. 580], in which it was said:

"Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles."

It follows that plaintiff is entitled to judgment as prayed in his petition.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

This case was tried before the appointment of WHALEY, *Judge;* he therefore took no part in its decision.

BANKERS RESERVE LIFE CO. v. THE UNITED STATES[1]

[No. K-408. Decided June 16, 1930]

On Demurrer to Petition

Jurisdiction; closing agreement as to taxes; sec. 1106 (b), revenue act of 1926; overpayment made under void statute.—Where the taxpayer executes a closing agreement under section 1106 (b) of the revenue act of 1926, the court is precluded from entertaining suit for an overpayment which, but for the agreement, would be recoverable. Nor does the fact that the overpayment was made pursuant to a provision of law declared unconstitutional and void by the Supreme Court in another case, pending at the time of agreement but not known to the taxpayer, invalidate the finality of the agreement as to such overpayment.

The Reporter's statement of the case:

Mr. Edward H. Horton, with whom was *Mr. Charles F. Kincheloe*, for the demurrer. *Mr. Lisle A. Smith* was on the brief.

Mr. Charles Kerr, opposed. *Messrs. James H. Adams, John J. Esch* and *A. K. Shipe* were on the brief.

The opinion sets forth the allegations of the petition.

LITTLETON, *Judge*, delivered the opinion of the court:

This suit was instituted to recover $27,727.71, the entire amount of income tax assessed, collected, and paid for the year 1924 under the provisions of sections 242 to 245, inclusive, of the revenue act of 1924.

Plaintiff is a life-insurance company organized under the laws of the State of Nebraska, with office and place of business at Omaha.

[1] Certiorari applied for.

Opinion of the Court

It was assessed and paid income tax for the calendar year 1924 of $27,727.71, of which $1,200.40 represented additional tax and interest thereon of $174.36. The additional tax and interest were paid January 17, 1928.

The aforementioned tax was determined, assessed, and collected for 1924 under section 245 (a) (2) of the revenue act of 1924 and in accordance with the provisions of Treasury Regulations 65, Art. 681. In so determining and assessing the tax in question, the Commissioner of Internal Revenue included in plaintiff's gross income for 1924 the amount of the tax-exempt interest of $449,345.36 received by it in that year and diminished the 4 per cent of the mean of plaintiff's reserve fund of $496,738.05, by the amount of taxable interest received by it. The commissioner's computation of the tax liability for 1924 is set forth in detail in Exhibit A attached to the petition, which need not be set forth here, but, by reference, is made a part of this finding.

Subsequent to the determination, assessment, and payment of the tax and interest in question, plaintiff and the commissioner, with the approval of the Secretary of the Treasury, on February 25, 1928, executed an agreement to the final determination and assessment of its tax for the calendar year 1924 under and in pursuance of section 1106 (b) of the revenue act of 1926. This agreement was as follows:

"THIS AGREEMENT, made in duplicate under and in pursuance of section 1106 (b) of the revenue act of 1926, by and between Bankers Reserve Life Company, a taxpayer residing at, or having its principal office or place of business at 19th and Douglas Streets, Omaha, Nebraska, and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury:

"WHEREAS there has been a determination and assessment of twenty-seven thousand, seven hundred twenty-seven dollars and seventy-one cents ($27,727.71), as the amount of tax or tax, interest, and penalty due the United States of America from said taxpayer on account of income for the (character of tax) calendar year 1924 (period covered);

"WHEREAS said taxpayer has paid the amount of tax or tax, interest, and penalty so determined and assessed, together with all accrued interest or penalty demanded without assessment; and

"WHEREAS said taxpayer has accepted any abatement, credit, or refund based on such determination and assess-

ment, and has accepted the adjustment made with respect to any and all claims filed in connection therewith;

"*Now, this agreement witnesseth*, that said taxpayer and said Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, hereby mutually agree that such determination and assessment shall be final and conclusive.

"*In witness whereof* the above parties have subscribed their names to these presents in duplicate."

At the time the foregoing agreement was executed, plaintiff did not know that the National Life Insurance Company had begun an action on July 15, 1925, contesting the validity of section 245 (a) (2) of the revenue act of 1921, nor did it know at the time of the execution of the agreement that said action was pending in the Supreme Court of the United States.

The petition in this case was filed September 3, 1929.

June 4, 1928, the Supreme Court of the United States in *National Life Insurance Company* v. *United States*, 277 U. S. 508, held that under section 245 (a) (2) of the revenue act of 1921, a life insurance company was entitled to deduct from its gross income the full four per cent of the mean of its reserve fund required to be held by law without diminution by the amount of interest received by it from tax-exempt securities. Thereafter, on June 12, 1928, plaintiff filed a claim for refund for the amount of $27,553.35, tax, and $174.36, interest, paid, basing its claim on the decision of the Supreme Court in *National Life Insurance Co.*, *supra*. This claim for refund was denied by the Commissioner of Internal Revenue on August 10, 1928, on the ground that the tax liability of plaintiff was settled by agreement of March 22, 1928, executed under and in accordance with the provisions of section 1106 (b) of the revenue act of 1926.

Defendant demurs to the petition upon the ground that the facts set forth therein do not constitute a cause of action against the United States and raises the issue whether under the allegations set forth in the petition and under the agreement of March 22, 1928, this court has jurisdiction to determine this suit and to annul, modify, or set aside the determination and assessment of plaintiff's tax for the year 1924 as made by the Commissioner of Internal Revenue.

It is agreed that if this court is not precluded from entertaining this suit by the closing agreement of March 22, 1928, executed under the provisions of section 1106 (b) of the revenue act of 1926, plaintiff is entitled to recover.

Under the decision of the Supreme Court in *National Life Insurance Company*, *supra*, plaintiff would be entitled to a deduction of $496,738.05, being four per cent of its mean reserve of $12,418,451.21, which would result in deductions of $228,918.53 in excess of its income.

Plaintiff contends that the decision of the Supreme Court in *National Life Insurance Co.*, *supra*, in which it was held that section 245 (a) (2) of the revenue act of 1921, which is the same as section 245 of the revenue act of 1924, was unconstitutional, nullified section 1106 (b) of the revenue act of 1926, involving final settlement agreements theretofore executed by insurance companies, with respect to and to the extent that insurance companies executing such agreements had not been permitted to deduct four per cent of the mean of their reserve funds from their general income, undiminished by the income from their tax-exempt securities.

In support of this contention plaintiff argues that Congress alone can authorize the assessment and collection of a tax; that this power can not be exercised except within the limits of the Constitution and, therefore, any act of Congress which transcends the limitations of the Constitution is void *ab initio*.

It is further argued that since section 245 (a) (2) was unconstitutional, there was no law in existence which authorized the assessment of the tax against plaintiff, and, since there was no law under which the tax could be imposed, the money paid by it was not in legal contemplation a tax, the agreement signed by plaintiff and the commissioner, and approved by the Secretary of the Treasury, was never binding in so far as it related to payments made as a tax computed under section 245 (a) (2).

The question is whether, in view of the provisions of section 1106 (b) of the revenue act of 1926, this court has jurisdiction to entertain this suit. This section provides that if after a determination and assessment in any case the taxpayer has paid in whole any tax, based on such determination

Opinion of the Court

and assessment, and an agreement is made in writing between the taxpayer and the commissioner, with the approval of the Secretary of the Treasury, that such determination and assessment shall be final and conclusive, then (except upon a showing of fraud, malfeasance, or misrepresentation of fact materially affecting the determination and assessment thus made) the case shall not be reopened or the determination and assessment modified by any officer, employee, or agent of the United States, and no suit, action, or proceeding to annul, modify, or set aside such determination or assessment shall be entertained by any court of the United States.

We think it is plain, in view of the agreement entered into between the plaintiff and the commissioner with the approval of the Secretary of the Treasury, that under this section this court is without jurisdiction to entertain this suit. The suit is brought for the express purpose of setting aside the determination and assessment by the commissioner and to recover the amount paid as tax and interest for the calendar year 1924. This is prohibited by the positive provisions of section 1106 (b) and this court has no authority to ignore the provisions of that section. Congress has authority to prescribe the conditions upon which the United States may be sued. It has done so in language that is too clear to admit of doubt and under the well-established principle that one who institutes a suit against the United States must bring the case within the authority of some act of Congress, or the court can not exercise jurisdiction over it, plaintiff is precluded from maintaining this action. *Aetna Life Insurance Co.* v. *Eaton*, decided by the court for the District of Connecticut on April 9, 1930. There is no showing of fraud, malfeasance, or misrepresentation of fact materially affecting the determination or assessment made in this case and the plaintiff is in no different situation than it would be if the suit were barred by the statute of limitation. In such a case the illegality of the assessment and collection would be of no assistance to plaintiff.

The purpose of the statute in providing for closing agreements was to enable the taxpayer and the Government finally and completely to settle all controversies in respect of the tax liability for a particular year or years and to pro-

Syllabus

tect the taxpayer against a further demand by the reopening of a case as a result of a different view of the matter being taken by the Government officers or as the result of subsequent court decisions prior to the expiration of the statute of limitations, and to prevent the filing of additional claims for refund or the institution of suit by the taxpayer for the same reasons. Congress thus expressly authorized the parties by agreement to shorten the period of limitation for the determination, assessment, and collection of a tax and for the filing of claims for refund, abatement, credit, and the institution of suit for the recovery of the amount paid.

The decision of the Supreme Court in *National Life Insurance Company case*, so far as concerns the plaintiff's right to maintain this suit, had no effect upon the validity of the provisions of section 1106 (b) of the revenue act of 1926. The plaintiff can only look to Congress for relief or for authority to maintain a suit for the recovery of any amount assessed and paid as a tax for the calendar year 1924.

The demurrer is sustained and the petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

This case was tried before the appointment of WHALEY, *Judge.* He therefore took no part in its decision.

CUNO ENGINEERING CORPORATION v. THE UNITED STATES

[No. H-278. Decided June 16, 1930]

On the Proofs

Excise taxes; automobile parts or accessories; electric cigar lighters.—Electric cigar lighters and combination electric cigar lighters and ash receivers, manufactured and sold by plaintiff, not primarily adapted for use on motor vehicles, but which may be mounted on dash or other convenient place in a motor vehicle and connected by cord with the source of electric current, *held* not to be an accessory for automobiles within the meaning of section 900 of the revenue act of 1921.

Same; construction of statute; classification of articles.—(1) The statute taxing accessories for automobiles was not meant by Congress to tax articles of every description used on or in connection with automobiles.

(2) It was the intent of Congress in taxing accessories for automobiles to distinguish between extraneous articles or devices capable and designed for use as a matter of comfort or luxury to the occupants of an automobile, and those so intimately connected with its safe operation and functioning elements that they become component parts of the machine's utility. The segregation to be made depends upon the facts of each case.

The Reporter's statement of the case:

Mr. Alex Koplin for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Arthur J. Iles* was on the brief.

The court made special findings of fact, as follows:

I. The Cuno Engineering Corporation during the times hereinafter mentioned was and now is a corporation organized, existing, and operating under and by virtue of the laws of the State of Connecticut, with its principal place of business located at Meriden, Connecticut.

II. During the period from July, 1922, to February, 1926, plaintiff was engaged in the business of manufacturing and selling, among other things, electric cigar lighters and combination electric cigar lighters and ash receivers. These articles by virtue of being made in various styles and models were adapted for use in various places. They were constructed and adapted for use on household lighting circuits as well as in connection with storage batteries of the style and voltages commonly used on automobiles, motor boats, etc. The basic elements and functioning of all of the styles of lighters are similar, the same consisting of a removable or interchangeable heating unit contained in a heating-unit holder, which in turn is attached to a conducting cord adapted to be connected with the source of the electric cur-

rent. The interchangeable heating units are wound for various voltages, and one can be selected and inserted in the holder in conformity with the voltage of the energy supply with which the lighter is intended to be used.

III. Plaintiff's Exhibit 5 is illustrative of one form of structure described in the previous finding. The structure of this lighter includes a protective casing containing a spring winding reel for the conducting cord. In this specific form the casing is provided with an attachment bracket and mounting screw having a duel function. The bracket and screw operate to mount the lighter on the edge of a dash or instrument board panel of an automobile or other automotive vehicle. At the same time the bracket and screw automatically provide the proper circuit connection to the grounded side of an automobile having a metal dash. An ungrounded terminal is provided on the lighter casing for the connecting of the ungrounded side of the electric energy supply, and the lighter is provided with a heating unit constructed and designed for six volts, the standard voltage for automobiles.

A second terminal is provided on the casing which may be utilized for the completion of the circuit to the electric energy supply when the lighter is installed in conjunction with an ungrounded source of energy supply or is mounted upon a nonconducting dash or fixture.

This specific form of lighter, as shown by plaintiff's Exhibit 5, would be capable of use for other purposes provided there was a free or exposed mounting edge on which the same could be clamped and provided the source of energy conformed to the six-volt standard.

IV. Plaintiff's Exhibit No. 7, a catalogue leaflet, or sales advertisement pamphlet entitled "Electric Match," makes reference to several other modifications, all involving the basic structure and principle set forth in Finding II. The lighters are described as follows:

(a) No. 640, "Combination Model," which is a model provided with an interchangeable 21-candlepower incandescent

light and bracket for mounting under dash having an automatic rewinding reel and switch.

(b) No. 603, "DeLuxe Dash Model," which is a model having an automatic switch and rewinding reel and adapted for mounting on either metal or wood dash, this type requiring a hole to be made in the dash.

(c) No. 634A, "Tonneau Model," is the combination of an electric match with an automatic switch and an ash receiver, stated to be easily mounted on any convenient flat surface but especially adapted for use in tonneau of automobiles.

(d) No. 600, "E-Z-On Dash Model," is the model for mounting on either wood or metal dash and having a six-foot cord, automatic rewinding reel, momentary contact push-button switch in handle, and reversible ash guard.

(e) No. 620, "Smoking Set," is a complete electric match with removable ash receiver. This model is provided with six-foot cord, automatic rewinding reel, and automatic switch; the entire set is encased in a black morocco leather case.

(f) No. 641, "Midget Model," is a nickel model with reversible ash guard, momentary contact push-button switch, and 2½-foot cord to be mounted at any convenient point, especially adaptable for connecting to radio battery.

The number of sales made to automobile jobbers, and on which the taxes were paid, exceeded the sales made to motor-boat supply dealers, other consumers, etc., and plaintiff did not know what definite application was made of the lighters on which the taxes were paid.

The devices taxed by the commissioner in this case were not primarily adapted for use on motor vehicles. They were adapted to general use for the purposes for which they were intended.

V. The plaintiff made and filed its manufacturer's excise tax returns monthly for the period September, 1922, to Februray, 1926, inclusive, showing the amount of tax due thereon which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by plaintiff, for

Opinion of the Court

the months, in the amounts, and on the dates hereinafter set forth, as follows:

Period	Year	Month	Year	Page	Line	Amount	Date paid
July	1922	Aug	1922	16	2	$434.14	8/28/22
Aug		Oct		4	8	562.61	10/4/22
Sept		Oct		18	6	617.25	10/30/22
Oct		Dec		0	4	711.19	12/1/22
Nov		Jan	1923	11	4	754.05	1/9/23
Dec		Jan		28	4	531.09	1/30/23
Jan	1923	Mar		0	1	379.50	3/1/23
Feb		Mar		17	4	198.32	3/29/23
Mar		May		3	4	383.10	5/4/23
Apr		June		3	6	565.14	6/5/23
May		July		5	1	598.47	7/5/23
June		Aug		24	2	537.86	8/31/23
July		Aug		20	8	804.35	8/30/23
Aug		Oct		10	3	665.51	10/6/23
Sept		Oct		25	1	528.02	10/31/23
Oct		Nov		22	7	860.57	11/30/23
Nov		Jan	1924	11	1	795.99	1/10/24
Dec		Jan		28	4	592.56	1/30/24
Jan	1924	Feb		22	9	281.92	2/29/24
Feb		Mar		20	4	269.79	3/31/24
Mar		Apr		27	9	264.20	4/30/24
Apr		June		2	5	336.44	6/3/24
May		June		22	5	213.07	6/30/24
June		Aug		1	4	172.10	8/2/24
July		Sept		7	0	122.67	9/9/24
Aug		Sept		13	5	183.24	9/30/24
Sept		Oct		10	6	152.63	10/31/24
Oct		Nov		13	7	215.22	11/29/24
Nov		Dec		12	9	423.13	12/31/24
Dec		Jan	1925	10	9	427.24	1/31/25
Jan	1925	Feb		7	8	115.31	2/25/25
Feb		Mar		4	1	104.55	5/5/25
Mar		Apr		13	5	161.90	4/29/25
Apr		May		8	9	144.27	5/28/25
May		July		14	0	144.15	7/30/25
June		July		10	3	214.69	7/29/25
July		Aug		11	5	303.23	8/31/25
Aug		Sept		7	5	251.57	9/28/25
Sept		Oct		7	5	268.50	10/28/25
Oct		Nov		7	3	219.36	11/24/25
Nov		Dec		9	7	593.59	12/31/25
Dec		Jan	1926	8	2	196.68	1/28/26
Jan	1926	Feb		6	7	132.73	2/25/26
Feb		Mar		8	5	135.36	3/29/26

VI. On September 2, 1926, plaintiff filed its claim for refund, #355164, of manufacturer's excise tax so paid on electric cigar lighters, combination cigar lighters, and ash receivers for the period July, 1922, to February, 1926, in the amount of $16,567.26, which was duly rejected by the Commissioner of Internal Revenue on May 31, 1927.

The court decided that plaintiff was entitled to recover, in part.

BOOTH, *Chief Justice*, delivered the opinion of the court:

Opinion of the Court

This is a tax case, involving the exaction of the amount claimed under section 900 of the revenue act of 1921 (42 Stat. 227, 291). The cited section reads as follows:

"That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentages of the price for which so sold or leased—

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

"(2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

"(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum."

Subdivision 3 of the revenue act of 1924 (43 Stat. 253, 323), reduced the tax rate from 5 to 2½ per cent. The plaintiff is a Connecticut corporation engaged in manufacturing and selling, among other electrical devices, cigar lighters and combination electric cigar lighters and ash receivers. The one issue in this case is: Whether the electric cigar lighters and combination lighters and ash receivers are taxable as either parts or accessories of an automobile. The facts, we think, are indisputable, and sufficiently appear to characterize the case. That the devices taxed were attached to and used by persons in automobiles is admitted, as well as the fact that the custom of the automotive trade was sought by public advertisements and in catalogues of the plaintiff. (Finding IV.) We think it clear that article 16 of the commissioner's regulations, defining parts, has no application here. If the devices are taxable they fall within the classification designated by the commissioner as accessories. It reads as follows:

"*Definition of accessories.*—An 'accessory' for an automobile truck, automobile wagon, or other automobile chassis

or body, or motor cycle is any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, or any article which is primarily adapted for use in connection with such vehicle or article whether or not essential to its operation or use."

The installation of a cigar lighter and ash receiver is manifestly a convenience to smokers occupying an automobile. It may or may not add to the ornamentation of a car. This is a matter of taste. The defendant asserts that "Congress meant to tax articles used on or in connection with automobiles." If so, the taxing statute has not been so construed by the commissioner or the courts. *Auburn Rubber Co.* v. *United States*, 67 C. Cls. 49; *Wells Mfg. Co.* v. *United States*, 66 C. Cls. 283; *Milwaukee Motor Products Co.* v. *United States*, 66 C. Cls. 295. The commissioner has not taxed flower holders, ash receivers, cardcases, toilet cases, vanity cases, baby cribs, or hammocks. Obviously a clear distinction prevails, and was within the intent of the revenue act, between an extraneous article or device capable and designed for use as a matter of comfort or luxury to occupants of an automobile, and one so intimately connected with its safe operation and functioning elements that it becomes a component part of the machine's utility. The segregation essential to make depends upon the facts of each case. We have held so more than once. *Edison Storage Battery Company*, No. F-359, decided May 6, 1929 [67 C. Cls. 543]; *Cracker Jack Co.*, No. F-97, decided February 4, 1929 [67 C. Cls. 89]. Aside from the general commercial value of the devices here involved, it is difficult to see how they in anywise prolong the life of a car, aid in its operation, or function to overcome any of the various difficulties attendant upon the car's operation, or the incidental inconveniences of automotive travel. A box of safety or loose matches, a separate automatic cigar lighter and ash receiver, clearly constitute a substitute for the devices involved. The electric lighter takes the place of all these and does no more than serve a personal convenience to the occupant of the car who desires and seeks its use. We think the devices are to be classified alongside flower holders, cardcases, etc., heretofore mentioned. Part of the amount claimed, $434.14, is

barred by limitation (section 3228 as amended by the revenue act of 1921 (42 Stat. 314) and the act of 1924 (43 Stat. 342)).

Judgment is awarded the plaintiff for $16,133.10 with interest as provided by law. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge,* concur.

This case was heard before the appointment of WHALEY, *Judge.* He therefore took no part in its decision.

UTAH POWER & LIGHT CO. v. THE UNITED STATES

[No. J-670. Decided June 16, 1930]

On the Proofs

Jurisdiction; consent decrees; binding effect.—A consent decree has the sanction of the court, is entered as its determination of the controversy, and has the same force and effect as any other judgment. In the absence of fraud or mistake it is valid and binding as such between the parties thereto and their privies.

Same; res adjudicata; right of suit.—Where the decree was in a district court of the United States and adjudged the defendant therein to have a right of way over land of the United States (Forest Service), "without prejudice to the rights of the defendant to make application * * * to a court of competent jurisdiction for refund of any amount of money heretofore paid to the United States for the occupancy of the said lands," the decree is res adjudicata in the Court of Claims as to such right of way, in suit for refund of the deposit money.

The Reporter's statement of the case:

Mr. Francis W. Clements for the plaintiff. *Messrs. Alexander T. Vogelsang* and *Lawrence H. Cake* were on the brief.

Mr. John E. Hoover, with whom was *Mr. Assistant Attorney General Charles B. Rugg,* for the defendant. *Messrs. Charles F. Kincheloe, Elton L. Marshall,* and *H. H. Clarke* were on the brief.

The court made special findings of fact, as follows:

I. The plaintiff on January 2, 1915, leased from the Utah Light & Traction Company, successor in interest of the Utah Light & Railway Company, the works and property located upon certain public lands of the United States described as follows, to wit:

All lands of the United States lying in sections 20, 19, and 30 in township two south, range two east, Salt Lake base and meridian.

II. The aforesaid works are known as the Granite plant, were and are built in part upon the said land, and plaintiff and its said predecessors have been for many years in possession of and have operated them for the generation of electric power in Big Cottonwood Canyon, Salt Lake County, Utah.

III. On September 23, 1912, the United States filed a bill of complaint against the Utah Light & Railway Company in the district court of the United States, district of Utah, central division, in equity, No. 397, alleging unlawful occupancy and possession of the said premises, praying for an injunction against operation of the said works, and asking for other relief. Whereupon, upon trial of the cause, a decree was entered July 6, 1914, enjoining maintenance and operation of the said works. On October 5, 1914, the Utah Light & Traction Company was by order of court substituted as party defendant.

Upon appeal to the Circuit Court of Appeals, Eighth Circuit, this decree was reversed, November 24, 1915, and the cause remanded for further proceedings on the ground that the defendant below might have acquired and probably did acquire certain vested rights with respect to some of the works constructed and completed prior to the act of May 14, 1896, 29 Stat. 120, which were denied to it by the decree entered.

Thereafter, on April 3, 1926, the lower court, pursuant to mandate, entered a final and amended decree, agreed to by stipulation of the parties, among other things declaring and adjudging the Utah Light & Traction Company "to have a right of way for a diverting dam, reservoir and flume, and

waterway, for use in the operation and maintenance of defendant's [Utah Light & Traction Company's] so-called 'Granite' plant [aforesaid], in, upon, over, and across the land of the United States as now located upon the said lands of the United States, to wit: All lands of the United States lying in sections twenty (20), nineteen (19), and thirty (30) in township two (2) south, range two (2) east, Salt Lake base and meridian," more particularly described in said amended decree, and finally, that the decree should "be without prejudice to the rights of the defendant to make application to Congress or to a court of competent jurisdiction for refund of any amount of money heretofore paid to the United States for the occupancy of the said lands of the United States used in connection with the said 'Granite' plant * * *."

IV. The decree referred to in the preceding findings was entered by oral stipulation of the parties to the action in which it was rendered, the United States being represented by its attorney who was specially authorized by the Attorney General of the United States to agree thereto, and was in conformity with an agreement made for the settlement and final disposition of the case theretofore made between the parties to the action.

V. In 1917 the sum of $10,068 was paid by the plaintiff upon demand of the United States, through the Forest Service, on account of charges accrued to July 30, 1917, for the occupancy and use of public land on which the Granite plant was in part built. Thereafter, from 1918 to 1925, inclusive, the plaintiff paid annually the sum of $615 as rental on account of the Granite plant, the payments so made from 1918 to 1925 amounting to $4,920. On account of the Granite plant plaintiff has paid a total of $14,988. After 1925 plaintiff made no payments as rental on account of the Granite plant.

The court decided that plaintiff was entitled to recover $14,988.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff brings this suit to recover $14,995 alleged to have been wrongfully collected from it by defendant for

use of land occupied by a certain power plant belonging to plaintiff known as the Granite plant. It bases its right to a refund of the money so paid upon—

First, the act of March 4, 1907, which in substance and effect provided for the refund of money paid "for the use of any land or resources of the national forests in excess of amounts found actually due from them to the United States"; and

Second, a decree entered by the United States district court for Utah in a suit wherein the defendant herein was plaintiff and the Utah Light & Traction Company (predecessor in interest to the plaintiff herein in and to the land involved in the case at bar) was defendant which adjudged that plaintiff's predecessor had "a right of way for a diverting dam, reservoir, and flume, and waterway, for use in the operation and maintenance of defendant's [Utah Light & Traction Company's] so-called 'Granite' plant."

This case has previously been before this court on a demurrer to the petition, which was overruled. It has now been submitted on its merits and in our opinion the ruling heretofore made on the demurrer practically determines the judgment which should now be entered. In the former opinion, after quoting from the decree entered in the case heretofore tried between defendant and plaintiff's predecessor, the same language as was above set out, and further stating that the allegations of the petition were that plaintiff had made total payments upon demand of defendant in the sum of $14,995 from 1917 to 1925 as rental for a right of way for its dam, reservoir, flumes, and waterway, in connection with its Granite plant, the court said:

"This state of facts admitted on demurrer would relieve plaintiff from making said payment of $14,995, which sum was in excess of amounts due the United States."

The facts above stated as being admitted by the demurrer are established by the evidence and conceded to exist. Therefore, if we follow the ruling which this court has heretofore made, judgment must be in favor of the plaintiff.

While counsel for defendant do not so state, we are asked in effect to reverse our former holding in order to enter a judgment in favor of defendant. The argument made on

behalf of defendant is in substance that the decree of the district court of Utah to which reference has been made above is not binding on this court for the reason that it was merely a consent decree. Counsel for defendant contend that consent decrees do not make the matters therein recited *res adjudicata* and that the recital in the decree that plaintiff's predecessor had a right of way, etc., is subject to review by this court and is not "conclusive as to all facts necessary to support the judgment entered."

We think the proposition that consent decrees do not make the matters therein recited *res adjudicata* can not be laid down as a general rule for the exceptions to it are more numerous than the case to which it is applicable. The authorities cited by counsel for defendant in support of this proposition will be discussed further on. As the question in the case is whether the rights of the parties were conclusively determined by the final decree entered in the district court after the case had been remanded from the Circuit Court of Appeals, it becomes necessary to consider what were the issues in the case, the recitals of the decree, and being a consent decree whether the person or persons who consented thereto on behalf of the Government had authority so to do.

The findings show that the United States filed its original bill of complaint against the Utah Light & Railway Company (predecessor in interest to the plaintiff herein) in the district court alleging in substance that the plaintiff herein unlawfully occupied and held possession of the premises involved in this suit, namely, the lands occupied by its so-called Granite plant, and being the premises involved in the case at bar. Upon this allegation (with others not material herein) issue was joined, the case went to trial and a decree was entered in favor of the Government. From this decree an appeal was taken to the United States Circuit Court of Appeals. The case was submitted to that court and an order entered setting aside the decree entered in the district court and remanding the case for further proceedings in accordance with directions given by the appellate court. Subsequently and after some negotiations between the par-

ties to the case, it was agreed that a decree should be entered by the district court in settlement of the issues involved in the case which pertained not only to the premises occupied by the Granite plant but also to the premises occupied by a plant called the Stairs plant.

The decree entered by the lower court on April 3, 1926, was made pursuant to the mandate of the Court of Appeals and agreed to by a stipulation of the parties. Among other things, it declared and adjudged the Utah Light & Traction Company "to have a right of way for a diverting dam, reservoir and flume, and waterway, for use in the operation and maintenance of defendant's [Utah Light & Traction Company's] so-called 'Granite' plant [being the plant involved in the case at bar], in, upon, over, and across the land of the United States as now located upon the said lands of the United States." The decree further went on to more specifically describe the lands referred to in that part of the decree set out above. The decree also provided that it should "be without prejudice to the rights of the defendant to make application to Congress or to a court of competent jurisdiction for refund of any amount of money heretofore paid to the United States for the occupancy of the said lands of the United States used in connection with the said 'Granite' plant." The evidence also shows that during the pendency of the suit in 1917, $10,068 was paid by the plaintiff upon demand of the United States on account of charges accrued to July 30, 1917, for the occupancy and use of public land on which the Granite plant was in part built. Thereafter, from 1918 to 1925, inclusive, plaintiff paid annually to defendant the sum of $615 as rental on account of the Granite plant, such rental payments amounting in all to $4,920. The total payments made by plaintiff to defendant on account of the land used by the Granite plant amount to $14,988.

It will be seen that the whole question in the case wherein the decree was rendered so far as the Granite plant is concerned was whether the plaintiff's predecessor had the right to occupy the premises upon which the Granite plant was in part erected, and that the court made a specific adjudication upon this point stating that the plaintiff's predecessor

had the right of way for use in the operation of the plant over the lands of the United States. It is obvious that if this decree is binding upon the defendant, there was nothing due the Government for the use of these lands and the money collected for the use thereof comes under the provisions of the act of March 4, 1907, and must be refunded. Some argument has been made based upon the provision of the decree to the effect that it should "be without prejudice to the rights of the defendant to make application to Congress or to a court of competent jurisdiction for refund of any amount of money heretofore paid to the United States for the occupancy of the said lands of the United States used in connection with the said 'Granite' plant * * *." This provision seems to have been made to avoid the inference which otherwise might have been drawn that the decree, being a settlement decree, settled all matters which pertained to the Granite and Stairs plants. By this provision it was made plain that the plaintiff might bring the suit which is now being presented to this court. While this is the only direct reference in the decree to the claim which the plaintiff is now presenting, it is quite clear that the matter now in controversy was involved in and concluded by its terms. If the plaintiff had a right to use the land, manifestly the defendant had no right to demand or receive anything for the use of it.

When we consider the circumstances under which the decree was entered, we find that it is clear that the party who appeared for the Government had authority to settle the case and agree to a decree. In the absence of any evidence, it is probable that his appearance in the case would presumptively be authorized, but the evidence goes further and shows that he was in communication with the Attorney General and the decree was entered in accordance with instructions received from that officer. If, by reason of the decree having been entered by consent, the judgment which forms part of it is not in fact an adjudication of the issues in the case in accordance with its recitals, then in all the numerous cases in which final decrees have been entered by Federal courts in accordance with the agreement between counsel for the

Government and counsel for the other party to the action, the decree is not binding upon the parties and becomes of no force and effect. The establishment of such a doctrine, we think, would not only surprise the legal profession generally, but render a final settlement of cases pending in courts practically impossible.

In this connection it should be noted that the decree which was entered by consent was in settlement of the case. As to the Stairs plant, the decree was against the Utah Light & Traction Company; as to the Granite plant, in its favor. It is now urged that the evidence shows that the plaintiff had not in fact completed the Granite plant at the time of the enactment of the act of May 14, 1896 (29 Stat. 120), and that by reason of the provisions of this statute the plaintiff never acquired any right in the public lands which the works of this plant occupied. Defendant's counsel go even farther and insist that the burden of proof is upon the plaintiff to show a completion of the plant prior to the enactment of this statute and cite a number of decisions where the right of a power company to occupy public land was involved in support of this contention. If we were trying anew the case in which the decree was rendered or had it before us *de novo* on an appeal, we might appropriately consider these decisions, but the question of the right of the plaintiff's predecessor to use the land which was occupied by its Granite plant has been tried and decided by a court of competent jursidiction and we can not now review this decision even though evidence is offered upon which a different judgment might be reached. As counsel for defendant contend that the rule is otherwise, we will briefly discuss the cases which are cited in support of their contention.

In *Lawrence Mfg. Co.* v. *Janesville Mills*, 138 U. S. 552, the plaintiff sought to have a former consent decree extended and then enforced and the court said:

"But where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill."

Accordingly, the court held that it was at liberty to inquire whether circumstances justified the relief asked and the

former decree having been entered by consent, the court had the right to decline to treat it as *res adjudicata*. But in the case at bar no modification of the former decree is sought, the plaintiff stands on the decree as it is, and the case is not one in which a new trial of the former action can be had.

Texas & Pac. Ry. Co. v. *Southern Pac. Co.*, 137 U. S. 48, has no application. The point involved therein so far as it has any bearing on the case under consideration was merely a question of the scope of a decree. An examination of this case, which seems to be especially relied upon by counsel for defendant, will show that the court did not pass upon the validity of the agreement upon which the decrees were entered but merely determined that this matter was neither in controversy nor passed upon in the causes in which the decrees were rendered. In short, instead of holding that the consent decree had no validity as an adjudication, the court simply held that it did not cover the matter involved in the case under consideration.

In *Kelley* v. *Milan*, 127 U. S. 139, a consent decree entered pursuant to an agreement or stipulation made by the mayor of the town was held not to be an adjudication because the mayor under the law of the State had no authority to make such an agreement. In the case at bar there is no question about the authority to enter into the stipulation upon which the judgment was based.

Gay v. *Parpart*, 106 U. S. 679, seems to have been misunderstood. In *Harding* v. *Harding*, 198 U. S. 317, 335 (a case in which a consent decree was held to be final adjudication), the court said with reference to *Gay* v. *Parpart*, *supra*, that it "dealt merely with the right of a court of equity to refuse to lend its aid to enforce an incomplete and ineffective decree in partition proceedings, because to do so would be inequitable."

Railway Co. v. *Stewart*, 95 U. S. 279, is merely another case where the scope of a consent decree was considered and it was held not to be a bar to the action before the court. On the other hand, the Supreme Court has gone so far as to hold that a decree in equity by consent of parties and upon a compromise between them is a bar to a subsequent suit

upon a claim therein set forth as among the matters compromised and settled although not in fact litigated in the suit in which the decree was rendered. See *Nashville, Chattanooga & St. Louis Ry. Co.* v. *United States*, 113 U. S. 261. The true rule with reference to a consent decree is that as it has the sanction of the court and is entered as its determination of the controversy, it has the same force and effect as any other judgment, and in the absence of fraud or mistake is valid and binding as such between the parties thereto and their privies. So far as it goes it stands as a final disposition of the rights of the parties thereto. It may be invalidated by a fraud or mistake; it may be shown that the party who consented thereto had no authority to give such consent; if it is incomplete and one of the parties thereto seeks to add to or change its provisions, the court may inquire into the justice of the whole decree; if it is ambiguous or indefinite as to its scope or application, the court may turn to the original agreement upon which it is based in order to determine how it should be construed, for it is in fact the agreement of the parties. But in the case at bar none of these considerations apply. As before stated there can be no question as to the authority of the attorney who agreed to its rendition on behalf of the defendant. No modification of the decree is asked by the plaintiff. There is no ambiguity in the decree, and its terms are so explicit as to practically exclude even argument as to its scope or construction. Even if it should be found that there was some reason why we should consider the agreement upon which the decree was based, the evidence shows that the decree was entered strictly in accordance with the agreement. On the whole we are clear that no facts or circumstances exist which authorize us to hold that the decree under consideration is not a final adjudication binding upon the parties to this action.

It follows that plaintiff is entitled to recover the amount collected from it by defendant for the use of the premises occupied by the Granite plant and judgment will be entered accordingly.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

This case was tried before the appointment of WHALEY, *Judge*. He therefore took no part in its decision.

HERMAN C. ERICSSON v. THE UNITED STATES

[H-432. Decided June 16, 1930]

On the Proofs

Patents; antiexplosive and noninflammable gasoline tanks; validity; infringement.—Claim No. 7 of the Ericsson patent on antiexplosive and noninflammable gasoline tanks, Letters Patent No. 1381175, granted June 14, 1921, *held* anticipated by prior art and invalid.

Same; incorrect description in letters patent; correct disclosure.—Where a claim in an application for patent, in describing the materials comprising the structure, uses a term which the disclosed construction shows is incorrect, the correct term will be substituted.

Same; special jurisdictional act of February 23, 1927; scope.—The special jurisdictional act of February 23, 1927, waived shop rights or license to use the alleged invention, and afforded the patentee a forum for the adjudication of his rights, irrespective of available defenses under the jurisdictional act of June 25, 1910, as amended by the act of July 1, 1918.

The Reporter's statement of the case:

Mr. Albert A. Jones for the plaintiff. *Hatch & Reed* were on the briefs.

Mr. Henry C. Workman, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Herman C. Ericsson, is a citizen of the United States, having at all times borne true allegiance thereto, and is the patentee and sole and exclusive owner of United States Letters Patent No. 1381175 for antiexplosive and noninflammable gasoline tanks, which patent was

granted June 14, 1921, on Application Serial No. 277119, filed February 14, 1919.

A certified copy of the file wrapper and contents of Application Serial No. 277119 (defendant's Exhibit D–1), which matured into patent No. 1381175, and which includes a copy of the patent, is by reference made a part of this finding.

II. The plaintiff was in the United States Army on duty in France during the period that the invention was conceived and reduced to practice and the application for letters patent filed, being a captain in the Quartermaster Corps. During the development of the invention defendant paid plaintiff his regular salary and allowances, and defendant furnished mechanics and employees for the construction of the tanks and tests, paid all costs and expenses in connection with the same, and furnished all materials used for the coverings of said tanks.

III. On February 23, 1927, Congress passed an act known as Private Act No. 381, Sixty-ninth Congress, entitled "An act authorizing the Court of Claims of the United States to hear and determine the claim of H. C. Ericsson," which act is as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the United States Court of Claims be, and it is hereby authorized and directed to hear and determine the claim of H. C. Ericsson for compensation for the adoption and use by the Government of the United States of a certain invention relating to an antiexplosive and noninflammable gasoline tank, for which letters patent of the United States, numbered 1381175 was issued to him June 14, 1921. Said claim shall not be considered as barred because of the use of the patented device by the Government for more than two years, or by any existing statute of limitations, nor because of the fact that the claimant was in the military service of the United States at the time the patented article was invented."

IV. The patent in suit relates to an antiexplosive and noninflammable gasoline tank, and has special reference to gasoline tanks for aeroplanes, with a general object to prevent the destruction of the plane by explosion or flame through bullet puncture of the tank in aerial combat.

The specification of the patent in suit discloses a single embodiment comprising a rolled-steel or copper tank with oval side, top, and bottom, and having thereon a covering comprising a plurality of layers of various materials. Next to the tank is a thin layer of adhesive cement, the object of which is to hold a layer of cord fabric adapted to strengthen the tank and give a suitable surface for the next layer, which is of uncured rubber, the function of which is when punctured to stop or reduce the flow of gasoline. Outside of this is a layer of auto-tire fabric to hold the rubber firm. This in turn is covered by a layer of corrugated paper with corrugations running vertically so as to form a multiplicity of small vertical channels serving to carry leakage to the bottom of the tank. Exterior of this is a layer of one-fourth-inch felt adapted to wipe off phosphorus from incendiary bullets, and outside of this is another layer of auto-tire fabric to reinforce and hold the felt. Over this layer is applied a layer of tire-thread gum to which in turn is applied another layer of felt, another layer of gum, and another layer of auto-tire fabric. All of this structure is covered by an outer tank of the same material and shaped as the inner tank.

The patentee states in lines 100 to 104 of his specification that:

"It will be observed that each layer and each material I use in my compound packing has its own individual function and that combined these layers extinguish the blaze on a tracer bullet * * *."

At the time of the filing of the application in the Patent Office the inventor claimed the following as his invention:

"1. A container having an elastic packing interposed between two metallic shells, for the purpose set forth.

"2. An elastic packing interposed between two metallic shells consisting of rubber and fibrous material, for the purpose set forth.

"3. An elastic packing interposed between two metallic shell containers and consisting of an elastic mass having a vertical drainage chamber formed therein, a bottom drainage tube being provided."

In the present suit plaintiff relies particularly upon claim 7, which is as follows:

"The combination with a metallic liquid-fuel container, of an elastic covering extending entirely around the same and tightly fitted to the container, said covering embodying a layer of elastic expansible material adapted to automatically close punctures, and a tire-tape covering tightly binding the said elastic layer to the container wall."

There is no tire-tape covering mentioned in the specification or described in the drawings of the patent, the disclosure of the patent being that of a tire-fabric covering. This claim was inserted by amendment during the prosecution of the plaintiff's patent application in the Patent Office, and the phrase "tire-tape" occurs in the original of the amendment.

V. In or around 1921–1923, defendant, without the consent of plaintiff, used a fuel tank with a leak-proof covering on the MB 3A planes, which planes were the standard pursuit aeroplanes used in the Army during this period. The detail specifications of these coverings, which refer to them as both fixed and detached coverings, plaintiff's Exhibit No. 13, are by reference made a part of this finding. These coverings comprised in essentials a layer or layers of rubber surrounding the metal tank, this rubber in turn being covered by a tire-duck or fabric impregnated with a suitable friction compound and laced on to bind the elastic or rubber layer to the metallic container.

The total number of MB 3A planes in the pursuit group equipped with the rubber coverings exceeded one hundred.

VI. It has been stipulated that the taking of testimony and the determination of the issue of reasonable and entire compensation be postponed until after the decision by the court upon the issues of validity and infringement.

VII. The latter part of April, 1918, plaintiff, at his own request and in order to develop his invention, was ordered to the aviation center at Issoudun, France, and during May and June he was engaged in the construction and experimentation with noninflammable tanks for aeroplanes. The materials for the construction of the tanks were not available at Issoudun and plaintiff had to return to Nevers for

the actual construction of the tanks. Plaintiff constructed tanks having the nine layers of material for the covering, and also with elastic rubber bound with canvas fabric.

Captain Scheleen, a test pilot, was engaged in the testing of aeroplanes at Issoudun. While not directly associated with the tests of plaintiff, he was sufficiently interested in them to watch their progress. Captain Scheleen recalls in June, 1918, seeing an aeroplane tank having a covering thereon that looked like unvulcanized rubber and was about three-eighths of an inch thick.

Major Carl Spatz was on duty in France between October, 1917, and October, 1918. For the greater part of this time Major Spatz was located at the Third Aviation Center at Issoudun, France. Major Spatz recalls, while at Issoudun, that there was a man experimenting with a leak-proof noninflammable tank which had a number of layers of material which was supposed to fill up the opening of bullets going through so that there would be no leakage of gas.

VIII. The testimony of Captain Scheleen and Major Spatz is sufficiently corroborative in character to fix the effective date of plaintiff's invention, as defined by claim 7, as of June, 1918.

IX. The following prior art patents were available to the public more than two years prior to the filing of the Ericsson application, which matured into the patent in suit:

French patent No. 460585, published December 5, 1913 (and translation thereof); defendant's Exhibit No. 9.

British patent No. 17292 of 1912, accepted November 28, 1912; defendant's Exhibit No. 15.

Swiss patent No. 71310, September 15, 1915 (and translation thereof); defendant's Exhibit No. 8.

British patent to Russell, No. 21423 of 1909, printed in 1910; defendant's Exhibit No. 3.

United States patent to Maurice et al., No. 617902, patented January 17, 1899; defendant's Exhibit No. 11.

United States patent to Meacom, No. 432061, patented July 15, 1890; defendant's Exhibit No. 10.

These exhibits are by reference made a part of this finding.

(a) The French patent, No. 460585, makes reference to the prevention of explosion from the rupture or tearing of a metallic reservoir containing inflammable hydrocarbons. The structure disclosed comprises an outer metallic container in which is arranged a layer of felt or fibrous material. This is held in place by a metallic cloth in the interior which is pressed against the fibrous material by means of a spring. A flexible container in the interior of this contains the hydrocarbon. The specification suggests the use of this structure on aeroplanes and refers to the functioning of the structure in obstructing the opening made by a projectile. The use of one or several layers of fibrous material is also suggested.

(b) The British patent, No. 17292 of 1912, discloses a double tank or reservoir for petrol constructed for the purpose of preventing the danger of fire in aeroplanes, motor cars, balloons, or the like. The tank is formed with an internal and external well and the space between is filled with a fibrous and absorbent material rammed down and compressed if desired. Reference is made to the fact that if a detached piece should happen to perforate both casings it would carry with it the fibrous material which would form a plug.

(c) The Swiss patent, No. 71310, discloses a safety tank stated to be for the purpose of preventing the leakage of its contents when punctured by bullets. The specification makes special reference to its use in connection with aeroplanes. The structure disclosed comprises a tank wall covered over with a layer of gelatinous elastic material. The use of material similar to that used in rollers of printing machines and comprising a mixture of glycerin and glue, is suggested. It is also suggested that one or more layers of rubber be imbedded in this gelatinlike mass. The specification states that the contraction after the penetration of the bullet is so perfect that leakage of the fluid from the tank is impossible. The gelatinlike elastic material is protected from injury and dampness by covering it with a waterproof material.

(d) The British patent to Russell, No. 21423 of 1909, relates to a method for protecting fuel tanks containing petrol

Reporter's Statement of the Case

or other fuel used in internal-combustion engines in aeroplanes and airships. The invention disclosed consists in providing a secondary or emergency envelope of a pliable yielding nature to completely enclose the tank. It is suggested that the envelope covering be of an elastic nature, such as rubber or rubber strengthened with canvas. The patent also states that the covering could be made or built on the tank by layers of sheet rubber and of fabric to form practically a seamless covering.

(e) United States patent to Meacom, No. 432061, discloses a naval vessel having a space between the inner and outer hulls which space is filled with strongly compressed cotton or a similar fiber for the purpose of arresting the penetrating force of projectiles.

(f) United States patent to Maurice, No. 617902 of January 17, 1899, relates to means for stopping leaks or holes in water-tight compartments caused by projectiles. This is stated to be accomplished by providing the compartments with a covering having plurality of slightly elastic buoyant bodies or floats which are compressible and are adapted to press against a hole and close it.

X. The following United States patents were issued subsequent to the effective date of plaintiff's invention on applications filed in the United States Patent Office prior thereto, which copies thereof are by reference made a part of this finding:

United States patent to Murdock, No. 1386791, patented August 9, 1921, filed January 16, 1918; defendant's Exhibit No. 6.

United States patent to Murdock, No. 1349290, patented August 10, 1920, filed February 7, 1917; defendant's Exhibit No. 4.

United States patent to Murdock, No. 1312745, patented August 12, 1919, filed June 23, 1917; defendant's Exhibit No. 5.

(a) Murdock patent, No. 1386791, discloses a tank for war aeroplanes or motor trucks having a covering comprised of a plurality of layers of material involving quick-swelling rubber and insoluble slow-swelling rubber, also duck fabric.

The function of this structure is described as providing and surrounding the tank with a rubber covering which will swell when punctured so that when a projectile passes through the envelope of the tank the puncture will be caused to be closed by the expansion of the material of the envelope.

(b) Murdock patent, No. 1349290, discloses a war-aeroplane fuel tank with means for the prevention of the escape of the fuel contained therein through holes made by bullets. The structure disclosed comprises an inner and outer shell having a resilient material which is stated to be vulcanized rubber retained under pressure. This filling is said to be composed of particles of soft rubber such as particles of rubber sponge.

(c) Murdock patent, No. 1312745, the object of which is stated to be for the provision of a self-sealing tank for use on military automobiles and aeroplanes. It discloses a tank surrounded by a sheet of rubber or other elastic and relatively thick material with a sheet or layer of relatively brittle and easily comminuted material. A layer of heavy cotton duck is applied exteriorly.

XI. United States patent to Imber, No. 1392892, relates to a tank for aircraft and was issued on October 4, 1921. The application which matured into this patent was filed in the United States Patent Office, December 18, 1918. The invention covered by this United States patent is substantially similar to British Imber patent, No. 122853, filed in Great Britain, April 6, 1918, and less than twelve months prior to the filing of the United States application. The oath in the United States application makes reference to the British application, and the United States application, therefore, has the same force and effect with respect to priority as it would have, had it been filed on April 6, 1918.

Imber United States patent, No. 1392892, defendant's Exhibit No. 2, certified copy of the oath of the same, defendant's Exhibit No. 13, and copy of Imber British patent, No. 122853, defendant's Exhibit No. 14, are by reference made a part of this finding.

The object of the Imber invention is stated to be for the purpose of preventing or minimizing leakage from the tank

Opinion of the Court

in the event of the tank being pierced and to prevent the contents in taking fire should the projectile be of an incendiary nature. The structure comprises a partitioned tank covered upon its exterior by means of a suitable covering of rubber or like material. The specification indicates that the same may be formed from a plurality of superposed sheets of any desired thickness.

XII. British patent to Thompson, No. 17511, was available to the public in the library of the United States Patent Office, October 24, 1917. This patent discloses a petrol tank for aircraft comprising a stationary cylindrical form with a rotatable covering or casing and a suitable packing of material interposed between the tank and casing, felt or leather being suggested as such material. A copy of this patent, defendant's Exhibit No. 7a, is by reference made a part of this finding.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

Congress on February 23, 1927, enacted the following special jurisdictional act:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the United States Court of Claims be, and it is hereby, authorized and directed to hear and determine the claim of H. C. Ericsson for compensation for the adoption and use by the Government of the United States of a certain invention relating to an antiexplosive and noninflammable gasoline tank, for which letters patent of the United States, numbered 1381175, was issued to him June 14, 1921. Said claim shall not be considered as barred because of the use of the patented device by the Government for more than two years, or by any existing statute of limitations, nor because of the fact that the claimant was in the military service of the United States at the time the patented article was invented."

The scope and purpose of the act are apparent. We do not think it is subject to the limitations insisted upon by the defendant. Clearly Congress intended to waive shop rights

or license to use the alleged invention, and afford the plaintiff a forum for the adjudication of patent rights, irrespective of available defenses under the jurisdictional act of June 25, 1910 (36 Stat. 851), as amended by the act of July 1, 1918 (40 Stat. 704, 705). *Dahlgren* v. *United States*, 16 C. Cls. 30.

The plaintiff was in the military service during the late war, being a captain in the Quartermaster Corps, and while so engaged became interested in the development of an anti-explosive and noninflammable gasoline tank for aeroplanes. The subject matter of the patent involved discloses a single embodiment of rolled-steel or copper tank with oval side, top, and bottom, having thereon a covering comprising a plurality of layers of various materials. The utility of the invention centers upon closing a possible leakage due to a puncture of the tank in combat, as well as the prevention of fire by removing the phosphorus from bullets upon penetration of the same.

Claim 7 of the patent is relied on for infringement. It reads as follows:

"The combination with a metallic liquid-fuel container, of an elastic covering extending entirely around the same and tightly fitted to the container, said covering embodying a layer of elastic expansible material adapted to automatically close punctures, and a tire-tape covering tightly binding the said elastic layer to the container wall."

The words "tire tape," used in connection with the words "covering tightly binding the said elastic layer, etc.," are obviously a mistake. No tire tape is disclosed in the drawings or described in the specifications, and we think the mistake was made during an amendment of the case in the Patent Office. "Tire fabric" was intended, and the claim when construed in the light of plaintiff's disclosed construction authorizes the substitution of the correct material. *Hiler Audio Corporation* v. *General Radio Company*, 26 Fed. (2d) 475, 478.

The vital issue in the case is patentability. We have no doubt as to infringement if the device is novel and involves the exercise of inventive genius. The prior art reflects a

decidedly narrow field for novel inventions pertaining to the prevention of leakage, fire and explosions due to the concussion, penetration, or disruption of containers for highly volatile and inflammable fluids such as here involved. One, if not the most important, citation relied upon by the defendant is the British patent to Russell # 21423, of 1909. This patent relates to a method of protecting fuel tanks containing petrol or other fuel used in internal-combustion engines, in aeroplanes and airships. The inventor discloses his purpose in the following language found on page 2 of the patent, viz:

"The object of the said envelope or covering being to prevent the leakage of spirit from the tank, and pipes if damaged which might happen through concussion or other cause. The said envelope or covering being of an elastic nature such as rubber, or rubber strengthened with canvas.

* * * * *

"What I claim in this invention is a pliable yielding elastic close-fitting secondary or emergency exterior cover or case to the tank of sufficient strength to withstand considerable shock and rough usage and prevent the possibility of the escape of petrol or other spirit from a leaky tank.

"The covering could be made or built on the tank by layers of sheet rubber and a fabric to form practically a seamless cover having the usual inlet and outlet connections, * * *."

It is true that the date of the invention is prior to the use of aeroplanes in aerial combat, but it is equally true that rubber possesses the inherent property of elasticity and will function to close a puncture made therein. One skilled in the art would apparently experience no difficulty, in view of the above disclosure, in extracting knowledge of how to protect an airplane fuel tank by surrounding it with elastic rubber held in place by a fabric. The plaintiff's conception seemingly follows closely—reading claim 7—the essential elements of the Russell patent. The use of an elastic material to accomplish what the plaintiff's covering to the tank did accomplish was manifestly old. Swiss patent #71310 of September 15, 1915, is one, we think, of definite anticipation. The inventor states that the object

of the invention is an arrangement for prevention of leakage of fluids from tanks which have been perforated by firearms. The patent then goes on to state that such an arrangement is particularly suitable for tanks of aircraft and is of the highest importance since it has been shown that in the majority of cases where aircraft have been shot down the cause of the fall is to be sought in the fact that the gasoline tank is perforated by bullets and its contents leak out. The specification of the patent states that "the tank wall is covered over with a layer of gelatinlike elastic material. This material can, for example, be such as that of which certain rollers in printing machines, hectograph pads, and the like are made." It is also suggested, from the following phraseology, that this material be enclosed in a protective cover:

"For the protection of the layer of gelatinlike elastic mass against injury and dampness it is for this purpose covered with a waterproof material."

The following quotation from the Swiss patent defines the functioning of the elastic cover:

"It is apparent that by the perforation of a bullet through such a mass no opening and no rent remains; that one in consequence of the elasticity of the mass can observe only a small round depression; there remains from the penetration of the bullet through the elastic mass nothing at all that resembles a rupture, but one observes only a round dent which indicates the place where the bullet has penetrated while the bullet on its way through the mass does not push the material in front of it or tear it, but only presses it sidewise. The contraction after the penetration of the bullet is so perfect a one that the leakage of the fluid from the tank is impossible.".

The following quotation from the same patent is especially pertinent to the use of rubber:

"For gasoline tanks it is still more required in the elastic layer of the gelatinlike mass that one or more layers of caoutchouc (rubber) be imbedded. Caoutchouc has, as is known, the property of dissolving in gasoline. Should, thus, benzine leak out of the perforation caused by the penetration of the bullet and reach the layer of caoutchouc, thus the same will soften and adds to the contraction of the perforation."

Syllabus

In claim 7 the plaintiff specifies the puncture-stopping material as "a layer of elastic expansible material adapted to automatically close punctures." By the use of this broad phrase the plaintiff has clearly avoided limiting himself to any specific material, such as rubber, and the gelatinlike elastic material specified by the Swiss patent clearly comes within the terms of claim 7. When one follows the teachings of the Swiss patent and constructs a "tank covering" in accordance therewith, they would formulate a construction coming within the terms of claim 7, and that which infringes, if early enough, invalidates. Both of the above patents were available to the public more than two years prior to the filing date of the Ericsson application and hence the actual date of plaintiff's invention and reduction to practice becomes of no importance.

There are many other patents in the art. We need not, we think, review them in detail. In our view of the case, as appears from the findings, claim 7 of the patent in suit is fully anticipated by the art and presents nothing that is not old and well known to those skilled in the art. As previously observed, the field for invention was circumscribed to an acute extent, and notwithstanding the commendable effort of the plaintiff in the line of safety, we are unable to sustain the contentions advanced from a legal point of view, and must dismiss the petition. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

This case was tried before the appointment of WHALEY, *Judge*. He therefore took no part in its decision.

COLORADO CONTINENTAL LUMBER CO. v. THE UNITED STATES

[No. H–388. Decided June 16, 1930]

On the Proofs

Income and profits tax; paid-in surplus; intangible asset.—Under the taxing statutes a paid-in surplus may not be allowed in respect of an intangible asset.

The Reporter's statement of the case:

Mr. George E. H. Goodner for the plaintiff. *Mr. Paul D. Banning* was on the brief.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff, a Colorado corporation, was organized in 1910 and has its principal office at Denver. Since that time it has been continuously engaged in selling lumber and sawmill products at wholesale on a commission basis and on its own account for profit.

Prior to incorporation of plaintiff, and since about 1905, there had been in existence a corporation known as the Continental Tie & Lumber Company, hereinafter sometimes referred to as the "Continental Company," which was engaged in the lumber industry with its principal place of business in the northern part of New Mexico on the Atchison, Topeka & Santa Fe Railroad and the Cimarron & Northwestern Railway, the entire capital stock of the latter company being held by the Continental Company. The market for the lumber products of the Continental Company was along the A., T. & S. F. R. R. and connecting lines to the north and east of the Continental Company's plant, in the States of Colorado, Wyoming, Kansas, and Oklahoma, and, occasionally, into Illinois. There were no lumber mills located on the Santa Fe Railroad farther east than the Continental Company. There were other lumber companies manufacturing the same kind of product as that of the Continental Company farther west and southwest than this company and their products were sold chiefly in the same market as that of the Continental Company but their freight rates were higher, which gave the Continental Company an advantage in the sale of lumber in this territory. The relation between the Continental Company and the Santa Fe Railroad was very close in that the development of the timber franchises held by the Continental Company gave the Santa Fe R. R. additional tonnage, and the Cimarron & Northwestern Railway referred to was constructed on in-

ducements of the predecessor of the A., T. & S. F. R. R., the St. Louis, Rocky Mountain & Pacific Ry., which was later on taken over by the Santa Fe, together with agreements regarding freight rates and divisions of rates to the C. & N. W. R. R.

The timber holdings of the Continental Company consisted of the exclusive right to cut the timber of the Maxwell land grant at the time of its organization in 1905, containing 1,500,000 acres, of which a considerable portion was timbered.

II. T. A. Schomburg had been in the lumber business for about 40 years, having been connected with five corporations prior to the organization of the Continental Company in 1905, of which corporation he was president and owned more than three-fourths of its capital stock.

III. For about three years prior to 1910 a corporation known as the Minnequa Lumber Company was engaged in the sale of lumber at wholesale and retail and had a number of retail lumber yards in southern Colorado. This corporation for three years prior to the organization of plaintiff had acted as sales agent for the Continental Company for all lumber products by the latter company for the States of Colorado, Wyoming, Nebraska, Kansas, and Oklahoma, the Continental Company being engaged exclusively in manufacturing and the Minnequa Company being engaged exclusively in selling at wholesale and retail, receiving a commission upon the sales of lumber produced by the Continental Company. The total sales made by the Minnequa Company of lumber produced by the Continental Company for 1909 and 1910 amounted to $242,000 for the two years. Schomburg was not a stockholder of the Minnequa Lumber Company. Charles E. Bullen was a stockholder in the Minnequa Company and had charge of its wholesale department.

IV. In 1910, at a conference regarding the selling of lumber, Bullen approached Schomburg with reference to the formation of a selling company, suggesting that the Continental Company authorize such proposed corporation to act as the sales agent for its products that had theretofore been sold by the Minnequa Company and that the proposed selling corporation also acquire from the Minnequa Company

other selling agreements which the latter company had with mills in the Northwest.

Schomburg and Bullen further discussed the field as to the advantage of organizing a new selling company. As a result, the Colorado Continental Lumber Company, the plaintiff herein, was organized for the purposes set forth above.

V. At incorporation its entire capital stock was of a par value of $25,000, the entire amount of which was issued one-half to C. E. Bullen and the other half, including a single qualifying share issued in the name of H. K. Holloway, was issued to T. A. Schomburg for $25,000 in cash. The Continental Company paid the $12,500 for one-half of the stock of plaintiff issued to Schomburg and thereafter he held the stock and the dividends thereon as nominal owner.

VI. Upon incorporation of plaintiff the Continental Company discontinued its arrangement with the Minnequa Company and made plaintiff its sales agent on the basis of a 5 per cent commission on sales of its products in the territory granted, and agreed to grant plaintiff a discount of 2 per cent for cash in 10 days in respect of sales of lumber, lath, moulding, and patterns. The plaintiff also acquired from the Minnequa Company the selling agreements which it had with other mills in the Northwest. Thereafter, the wholesale department of the Minnequa Company was discontinued.

Schomburg and Bullen were the principal officers and were directors of plaintiff, and were employed by it to sell its product. Bullen devoted a greater portion if not his entire time to the business of plaintiff. From the start plaintiff paid Bullen a salary of $300 a month. During the first two or three years plaintiff paid no salary to Schomburg. Thereafter it paid him a salary, the amount of which is not shown. Prior to the organization of plaintiff Bullen was a minority stockholder and a salaried official in charge of the wholesale department of the Minnequa Company. He had become familiar with lumber trade and knew the customers of the Minnequa Company.

No cash was paid by plaintiff to the Continental Company for the privilege of acting as its sales agent. Nor did plain-

tiff pay any amount to the Minnequa Company for the selling agreements which it acquired from that corporation. As a result of the Continental Company making plaintiff its sales agent and the acquisition by the plaintiff of sales agreements from the Minnequa Company and its employment of Schomburg and Bullen, plaintiff commenced business with an established trade. At the time of incorporation Schomburg and Bullen "estimated" that the net earnings of the plaintiff would be at least $10,000 a year. No entries have ever been made on the books of account of plaintiff for any intangible asset. During the first six years of plaintiff's existence its profits were $8,365.98 for 1911, $13,479.46 for 1912, $8,721.97 for 1913, $11,302.67 for 1914, $9,995.84 for 1915, and $18,606.52 for 1916, making a total of $70,472.44.

VII. Plaintiff filed its tax return for 1918 and paid the tax of $3,965.16. Subsequently, on October 27, 1922, the commissioner assessed an additional tax for this year of $4,015.68, which plaintiff paid, together with interest of $301.18. February 1, 1924, plaintiff filed with the collector at Denver a claim for refund on the form prepared by the Treasury Department, claiming a refund of $4,316.86, or such greater amount as might be legally refundable for 1918. The grounds stated in this claim for refund were as follows:

"This claim for refund is now filed for the reason that taxpayer contends that the excess-profits tax as computed on the basis of statutory invested capital is excessive, abnormal, oppressive, and far in excess of the average tax paid by similar corporations in the same line of business with the same 'capital employed'; for the reasons set forth in the original and amended returns on file and in the abatement claim already filed and in the correspondence and briefs filed with the Commissioner of Internal Revenue at Washington, D. C., and with the Committee on Appeals and Review; all of which documents are specifically referred to and made a part hereof.

"And for the further reason that taxpayer claims assessment under the provisions of sections 327 and 328 or under section 303 of the revenue act of 1918.

"And for the further reason that when taxpayer's correct tax liability is determined upon the basis of statutory invested capital it will be shown that it has already over-

paid its taxes in the sum of $931.05, together with interest thereon at the rate of 6% per annum for 15 months, $69.83; total amount, $1,000.88; all of which was paid under protest on October 28, 1922.

"And for the further reason and purpose of protecting taxpayer's rights in claiming interest under the provisions of section 1324 of the revenue act of 1921 at the rate of 6% per annum from October 28, 1922, upon such amount as may finally be determined to have been overpaid."

VIII. Upon consideration of plaintiff's claim for refund the commissioner denied its application for special assessment and determined its net income for 1918 to be $22,628.19; the invested capital to be $91,597.22; the excess-profits tax to be $5,198.19; and the total income and profits tax liability for the year to be $7,049.79. As a result of this decision the commissioner determined that there had been an overpayment of $931.05, which amount was duly refunded to plaintiff. The claim for refund was otherwise denied.

IX. Plaintiff made its return for 1919 and paid a tax of $3,345.58. Subsequently, on October 23, 1922, the commissioner assessed an additional tax for this year of $1,702.89, which plaintiff paid, together with interest of $212.86. March 11, 1925, it filed with the collector a claim for refund on a form prepared by the Treasury Department demanding a refund of $5,048.47 for 1919, or such greater amount as might be legally refundable. The grounds of this claim for refund were that the plaintiff was entitled to classification as a personal-service corporation, or, in the alternative, that it was entitled to have its profits tax computed under the special-assessment provisions of sections 327 and 328 of the revenue act of 1918.

Upon consideration of this claim the commissioner denied the claim for personal-service classification, the application for special assessment, and determined the net income to be $23,937.77; the invested capital to be $104,979.03; the profits tax to be $3,096.28; and the total income and profits tax liability to be $4,964.49. As a result of this decision the commissioner determined that there had been an overpayment of $83.98, which amount was duly refunded. The claim for refund was otherwise denied.

X. At the time plaintiff's claim for refund for 1918 was filed there was on file with the commissioner a claim for abatement in respect of the tax for 1919 in which plaintiff claimed that it was entitled to classification as a personal-service corporation and a letter, dated June 14, 1923, addressed to the Commissioner of Internal Revenue, and signed by plaintiff's counsel and verified by T. A. Schomburg, in support of its claim for special assessment of its profits tax under the provisions of sections 327 and 328 of the revenue act of 1918 on appeal to the committee on appeals and review. In this letter plaintiff insisted in support of its claim for special assessment that it had a good will of $75,000 "which, under the law, it is not permitted to use in statutory invested capital."

XI. Plaintiff filed its return for 1920 showing a tax of $6,199.15, of which amount $1,868.45 was paid on March 23, 1926, together with interest thereon of $475.15. Upon audit of this return the commissioner determined the net income to be $28,487.02; the invested capital to be $122,318.96; the profits tax to be $3,944.94; and the total income and profits tax liability to be $6,199.15.

March 30, 1926, plaintiff filed with the collector a claim on the form prepared by the Treasury Department demanding a refund of $2,000, or such greater amount as might be legally refundable, of the tax paid for 1920. The claim for refund for 1920 stated that there had been an understatement of invested capital by excluding dividends on Trinchera Timber Company stock; also by failing to take into account the nonpayment of the 1917 and 1918 taxes, which were paid after the taxable year 1920.

The claim for refund also claimed the right of special assessment under sections 327 and 328 of the revenue act of 1918. One of the reasons set forth in the claim in support of the right of special assessment was that the greater part of the income was due to good will, which the law did not permit to be included in invested capital. This claim for refund had not been acted upon by the commissioner at the time suit was instituted on October 1, 1927.

Opinion of the Court

XII. In determining the invested capital of plaintiff for each of the years 1918, 1919, and 1920, neither the plaintiff in its returns filed nor the Commissioner of Internal Revenue in his final determinations included in invested capital any amount as paid-in surplus as the cash value of good will, or other intangible asset.

XIII. In none of its claims for refund did plaintiff ask that any amount on account of intangibles be included in its invested capital, nor did it make any claim for refund on the ground that its profits tax should be decreased by increasing the invested capital by the inclusion therein of any alleged value of good will or other intangible. The specific ground stated in each of the refund claims, with the exception of the claim for refund for 1920 in which plaintiff claimed that its invested capital had been understated by including dividends on the stock of the Trinchera Timber Company and by failing to take into account the nonpayment of the 1917 and 1918 tax of plaintiff subsequent to 1920, was that plaintiff was entitled to a computation of its profits tax under sections 327 and 328 of the revenue act of 1918, and in its claims plaintiff did not preserve its right to a refund for any other reason.

XIV. There is no satisfactory proof of the cash value of the good will, if any, acquired by it.

The court decided that plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff insists that it has a right to maintain this suit and to have the court determine its right to include in invested capital, as a paid-in surplus, the alleged cash value of good will, on the ground that, although it did not make the inclusion in invested capital of good will a specific ground for its claim for refund, it was the duty of the commissioner to decide the case upon the facts before him, and that plaintiff had filed with the commissioner certain documents in which it claimed a substantial value for good will as the ground for special assessment.

Plaintiff further predicates its right to judgment upon the ground that it acquired a good will of a cash value of

$50,000, and that, although this good will was acquired without cost or without the issuance of stock therefor, it may be included in invested capital as a paid-in surplus.

Conceding, without deciding, that plaintiff has a right to maintain this suit, it is not entitled to recover because under the statute a paid-in surplus may not be allowed in respect of an intangible asset. *Daily Pantagraph* v. *United States*, decided by this court June 10, 1929 [68 C. Cls. 251]; *Herald-Despatch Co.*, 4 B. T. A. 1096; *Shope Brick Co.*, 5 B. T. A. 1042; *J. M. & M. S. Browning Co.*, 6 B. T. A. 914; *Daily Pantagraph Co.*, 9 B. T. A. 1173; *Stephens-Adamson Mfg. Co.*, 16 B. T. A. 41. Furthermore, even if a paid-in surplus might be allowed in respect of an intangible asset, there is a complete lack of proof of facts sufficient to establish a cash value for any intangible asset that plaintiff may have acquired upon incorporation. The right given to plaintiff by the Continental Tie & Lumber Company to sell the lumber products of the latter company on a commission basis in a certain territory was perhaps an advantageous arrangement, but this can not be regarded as the acquisition by the plaintiff of a valuable good will. The acquisition by the plaintiff from the Minnequa Company of certain selling agreements possessed by that company can not enter into invested capital as a paid-in surplus, or otherwise, because nothing was paid for this, and the Minnequa Company was not a stockholder. *A. C. F. Gasoline Co.*, 6 B. T. A. 1337; *Frank Holton & Co.*, 10 B. T. A. 1317.

In addition to the foregoing, plaintiff's claim of value is not justified by the facts. Plaintiff asks the court to adopt the use of Hoskold's formula, and apply it to earnings subsequent to the date on which the value of good will is claimed. The only basis for the application of this formula to subsequent earnings is that upon incorporation Schomburg and Bullen "estimated" that plaintiff would earn a net profit of at least $10,000 a year. This is not sufficient to justify the use of a formula; moreover, there are no facts to establish all of the necessary elements as a basis for the application of the formula. The facts show only the net earnings. There is no proof of the tangible assets em-

ployed in the business during the period from 1911 to 1916, inclusive, over which plaintiff seeks to arrive at an annual average to which it applies certain percentages.

The petition must be dismissed, and it is so ordered.

WILLIAMS, *Judge*; GREEN, *Judge*; and BOOTH, *Chief Justice*, concur.

This case was tried before the appointment of WHALEY, *Judge*. He therefore took no part in its decision.

PERFECTION GEAR CO. v. THE UNITED STATES

[No. H-467. Decided June 16, 1930]

On the Proofs

Excise taxes; automobile parts or accessories; silent timing gears.—Plaintiff's silent timing gears, used in the functioning of internal-combustion engines in timing the opening and closing of valves, especially designed and primarily adapted for use in automobile engines, *held* to be taxable as automobile parts or accessories.

The Reporter's statement of the case:

Mr. Alex Koplin for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Arthur J. Iles* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff is an Illinois corporation and is successor to D. H. & G. H. Daskal and David Davis, a partnership. During the period from January, 1921, to February, 1926, it was engaged in the manufacture and sale, among other products, of silent timing gears used in the functioning of internal-combustion engines. These gears were made of a composition designed to eliminate noise in operation and were used as a part of the timing system of an internal-combustion engine, their function being to time the opening and the closing of valves.

Reporter's Statement of the Case

II. Plaintiff made and filed its manufacturers' excise tax returns monthly for the period January, 1921, to February, 1926, inclusive, showing the amount of tax due thereon which was duly assessed on such returns by the Commissioner of Internal Revenue and paid by plaintiff for the months for which the returns were made, the total amount of tax paid being $24,398.48. The silent timing gears, upon the sale of which the tax in question was assessed and paid, were especially designed and primarily adapted for use in automobile engines. Plaintiff manufactured gears and advertised and sold them as replacements for timing gears on almost every known make of engine for automobiles and trucks. During the taxable periods in question silent gears were not a part of the original equipment of any automobile engine and they were sold only for substitute or replacement purposes. Plaintiff did not sell direct to any maker or manufacturer of automobiles or engines for automobiles. Its product was sold mainly to jobbers. The gears manufactured and sold by plaintiff were similar in character but were not all of the same design. The various gears manufactured and sold by plaintiff were given a stock number which indicated the type and make of the internal-combustion engine for which they were to be used. There is no satisfactory proof that any portion of the tax in controversy returned and paid by plaintiff was computed upon sales of timing gears other than the gears especially designed and primarily adapted for use on the various makes of automobile engines.

III. May 22, 1923, plaintiff filed a claim for refund of manufacturers' excise tax paid on timing gears for the period January, 1921, to March, 1923, inclusive, in the amount of $12,321.06. This claim was rejected by the Commissioner of Internal Revenue September 19, 1923.

Later, plaintiff requested the commissioner to reopen and reconsider this claim for refund, and on May 13, 1927, the commissioner sustained the action he had previously taken on the claim.

October 10, 1926, plaintiff filed a claim for refund of the excise tax paid on timing gears for the period April, 1923, to

February, 1926, inclusive, in the amount of $12,077.42. This claim was rejected by the commissioner May 23, 1927.

IV. This suit was instituted by the filing of the petition on November 14, 1927.

The court decided that plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff contends that the Formica Timing Gears manufactured and sold by it, upon the sale of which the tax in question was collected, were not parts for automobiles. These gears were especially designed and primarily adapted, and were widely advertised and sold, for use on almost every known make of engine for automobiles and trucks. They were therefore properly classed as automobile parts, and the sale therefor was subject to tax. *Universal Battery Co.* v. *United States*, decided by the Supreme Court May 26, 1930 [281 U. S. 580].

It is contended by plaintiff that inasmuch as the silent timing gears were also adapted for use on internal-combustion engines used for purposes other than on automobiles, and were also advertised and sold for general use on such engines, it was not liable for the tax on any of the sales. But when it appears, as here, that the article is primarily designed and adapted for use on automobiles, and that it is widely advertised, sold, and primarily used as parts for automobiles, the sales are taxable, and the burden is upon the taxpayer if he contends in a suit to recover the tax that all of the articles sold were not so used, to establish the amount of such sales. When the primary and chief use of an article is established that subjects it to the tax the manufacturer can not escape the tax upon his entire sales by showing that the article could and may have been used for some other purpose, without showing the number of those sold and taxed that were so used. Nor is it of any help to him to say at this time he does not know and has no way of ascertaining the amount of sales of articles for use other than as automobile parts. In *Universal Battery Co.* v. *United States*, *supra*, the court said:

"The administrative regulations issued under section 900 uniformly have construed the term 'part' in that section as

Syllabus

meaning any article designed or manufactured for the special purpose of being used as, or to replace, a component part of such vehicle, and which by reason of some characteristic is not such a commercial article as ordinarily would be sold for general use, but is primarily adapted for use as a component part of such vehicle. * * *

" * * * Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles. And it would be also unreasonable to hold that articles can be so classified only where they are adapted solely for use in motor vehicles and are exclusively so used."

The facts in this case bring it within the rule announced by the Supreme Court and the plaintiff is not entitled to recover.

In view of this conclusion, it is not necessary to pass upon the contention of the defendant that recovery of $6,423.32 included in the plaintiff's claim for refund for $12,321.06, which was rejected by the commissioner September 9, 1923, and representing the tax paid in June, July, August, October, and November, 1922, is barred by the statute of limitation.

The petition must be dismissed, and it is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

This case was tried before the appointment of WHALEY, *Judge*. He therefore took no part in its decision.

FAIRMOUNT TOOL & FORGING CO. v. THE UNITED STATES

[No. J-106. Decided June 16, 1930]

On the Proofs

Excise tax; automobile accessories; tool kits; separate tools.—Tool kits assembled, advertised, and sold for use in connection with automobiles and primarily adapted for use thereon are accessories for automobiles within the meaning of the taxing statutes, notwithstanding the separate tools are not designed specially for such use.

The Reporter's statement of the case:

Mr. George M. Wilmeth for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Arthur J. Iles* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff during the times hereinafter mentioned was and now is a corporation organized, existing, and operating under and by virtue of the laws of the State of Ohio, with its principal place of business located at Cleveland, Ohio, and during said time manufactured and sold tools for all purposes; i. e., railroad and agricultural equipment, general mechanical tools; equipment for the various trades—bricklaying, stonecutting, and contractors, as well as for trucks, automobiles, and boats.

II. No tax was paid on the tools manufactured by plaintiff when sold separately, but when assembled and made up into a kit plaintiff was required to and did pay taxes thereon.

In February, 1923, plaintiff published a catalogue, herein described as plaintiff's Exhibit 2, which by reference is made a part of this finding, wherein are illustrated and described the tool kits the subject of this suit. On page 50 thereof No. 350 kit is described as "Designed for sale to used-car distributors, which contains a hammer; 3 wrenches of different sizes; 1 adjustable 9-inch wrench; 1 pair combination pliers, 6 inch; 1 screw driver, 3-inch round shank; and 1 cold chisel, 3/8 inch. These tools were assembled in a canvas roll with a pocket for each tool.

On page 51 No. 378 kit is described as containing, in addition to the same articles described in No. 350, 1 screw driver, 5-inch square shank; 1 solid punch; 1 cotter-pin puller; and 1 flat file. It was also assembled into a canvas roll. However, it is not stated for what purpose it was designed.

Kit No. 5 is described on page 52, which states that it is "Designed for carrying in door pocket so that the necessary tools for quick repairs may be readily accessible." It contains 1 hammer, 1 pair combination pliers, 1 wrench, and 2 screw drivers, and is assembled in a canvas roll.

No. 10 kit, described on page 53, states that it is "Designed as a moderate-priced set of highest quality tools for the owner of medium and low priced cars."

No. 10–F kit is stated to be "Designed particularly for use on Ford and Willys Overland cars," and shows also a combination of tools similar to those heretofore described, and is assembled in a canvas roll.

No. 15 kit is stated to be "Designed for owner that wants a better tool kit than the one that came with his car. All tools are properly heat-treated and highly finished so that it will outlast the car." It contains in a canvas roll a combination of tools similar to those above described and also a wrench with spark plug and handle, and 1 tire and rim tool.

No. 20–P kit is stated to be "Designed for the summer tourist. With a 20–P kit in his equipment he is prepared for any emergency." It also contains an assembly of various tools as heretofore described.

No. 20–T kit is described as being "Designed for use on trucks, busses, fire apparatus, and heavy tractors. Particular attention has been given to quality in this set." It also contains a number of tools assembled in a heavy canvas roll.

No. 25 kit is described as being "Designed for the garage mechanic for a portable emergency set and the car owner who does his own repair work." The tools in this kit are assembled in a canvas roll.

No. 30 kit is described as "This set is for the man who wants something better. The tools are polished and have a very attractive appearance." The tools herein are assembled into a canvas roll.

No. 35 kit is described as being "Designed for use in the private garage. One tool kit like the 20–P should be kept in the car at all times and one like the number 35 in the garage at all times. Full-finished tools and a tool for every purpose." It contains an assembly of a number of tools and is put in a canvas roll.

Illustrations of all the above-mentioned kits are found in said catalogue, Exhibit 2, on pages 50 to 60, inclusive.

III. Plaintiff also assembled an assortment of tools in a green-lined container. It had the same character of tools

as in the canvas rolls, except some of the pliers were nickel-plated instead of steel black finish, the hammer was more polished, and was advertised for the Christmas trade and put up in Christmas packages. It is stated in plaintiff's advertisement that "The No. 328 straw finish set appeals strongly to the women folks," and it is also stated that "No. 400 set will be appreciated by the car owners and others who do not own automobiles but can always find some use for a practical set of tools."

The tools taxed in this case by the commissioner as packed and sold were primarily adapted for use on automobiles.

IV. Plaintiff made and filed its manufacturer's excise tax returns monthly for the period February, 1919, to June, 1924, inclusive, showing the amount of tax due thereon which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by plaintiff, for the months, in the amounts, and on the dates hereinafter set forth as follows:

Period		Year	Page	Line	Amount	Date paid
Year	Month					
1922	Nov.	1922	30	7	$425.25	11/18/22
"	"	"	30	7	250.00	1/17/22
"	"	"	30	0	250.00	12/21/22
"	Dec.	"	11	2	87.92	12/31/22
1923	Jan.	1923	6	0	23.65	1/2/23
"	Feb.	"	2	5	38.91	2/1/23
1924	Aug.	1924	26	2	670.44	4/7/27
1927	April	1927	505	3	203.96	4/7/27

V. On July 28, 1923, plaintiff filed its claim for refund No. 313138 of manufacturer's excise tax so paid on tool kits for the period February, 1919, to December, 1922, inclusive, in the amount of $1,075.73, which was allowed in the amount of $421.21 and rejected by the Commissioner of Internal Revenue in the amount of $654.52 on December 9, 1924, and subsequent thereto the commissioner found an excessive refund had been made to plaintiff in the amount of $155.26, which was paid by plaintiff on October 10, 1925, in the amount of $69.63 and on June 26, 1926, in the amount of $85.63.

VI. On June 25, 1926, plaintiff filed its claim for refund No. 353945 of manufacturer's excise tax, penalty, and in-

terest, assessed against and paid by plaintiff on tool kits for the period May, 1919, to December, 1922, in the amount of $90.17, which was duly rejected by the Commissioner of Internal Revenue on January 5, 1927.

VII. On April 2, 1927, plaintiff filed its claim for refund No. 7830 of manufacturer's excise tax so paid on tool kits for the period January, 1923, to June, 1924, inclusive, in the amount of $874.40, which was duly rejected by the Commissioner of Internal Revenue on December 7, 1927.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

Section 900 of the revenue act of 1918, 40 Stat. 1057, 1122, provides as follows:

"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentages of the price for which so sold or leased—

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum.

"(2) Other automobiles and motorcycles (including tires, inner tubes, parts and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum.

"(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum."

The revenue acts of 1921, 42 Stat. 227, 291, and 1924, 43 Stat. 253, 322, in so far as the issue involved in this case is concerned, in nowise change the law.

The plaintiff, an Ohio corporation, manufactures and sells to jobbers and dealers a great variety of standard mechanics' and machinists' tools. The segregated units which occasion this litigation are accurately described in Finding II. As a typical illustration "Kit 10–F" will suffice. This aggregation is set forth in plaintiff's catalogue as "designed par-

Opinion of the Court

ticularly for use on Ford and Willys Overland cars," and is made up of ten individual tools embracing a hammer, pliers, six wrenches, and two screw drivers, encased separately in a canvas roll designed for compactness and convenience and packed for the dealers in an individual carton, with a list price of $5 printed thereon. Kits of more extensive make-up and costing more are also advertised and commented on as possessing superior advantages.

The Commissioner of Internal Revenue assessed and collected a manufacturers' excise tax upon the foregoing "kits," justifying the collection under the above revenue laws. The plaintiff filed a claim for refund, which was denied, and hence this suit to recover the amount claimed.

The plaintiff seeks to escape taxation, upon a contention that the regulations of the commissioner with respect to automobile accessories are too comprehensive and therefore illegal in including such general purpose articles, which when sold separately are concededly nontaxable, but become so when segregated in units and advertised for use on an automobile.

The regulations challenged go much into detail and read, so far as pertinent here, as follows:

"ART. 14. * * * Any article which has reached a state of manufacture wherein it is in itself a component part or accessory, and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or producer, is subject to tax as a 'part' or 'accessory.'

* * * * * * *

"ART. 15. * * * any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as component part of such vehicle.

* * * * * * *

"Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles.

"Component parts of articles taxable under this definition are taxable when sold separately, if they have reached such stage of manufacture that they are primarily adapted for use as such a component part.

* * * * *

"ART. 16. * * * any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation.

* * * * *

"Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motor cycles are not subject to tax as 'parts' or 'accessories.' * * *

"Parts or accessories for automobile trucks, automobile wagons, other automobiles, or motor cycles primarily adapted for use on or in connection therewith when sold for any other purpose are not taxable, provided the purchaser files with his order a statement that such parts or accessories are to be used on or in connection with another article of commerce not enumerated or included in subdivisions (1), (2), or (3) of section 900. For example, a self-starter primarily adapted for use on an automobile, if sold to a manufacturer of motor boats, such manufacturer stating in his order that it is to be used in the manufacture of a motor boat and not upon an automobile, is not taxable."

The machinery of an automobile necessitates the employment of a variety of accessories. Article 16, quoted above, expresses the general conception of the commissioner in dealing with the class of articles. Tools of general utility, i. e., capable of use for a variety of purposes, may not escape classification as an automobile accessory upon this single fact. This, we think, is apparent. Ordinary monkey wrenches, pliers, hammers, etc., may serve a variety of useful purposes; but when set aside and singled out for an especial purpose, the very necessity of so doing emphasizes the correctness of classifying them as accessories to the purpose. The plaintiff, in order to appeal to a special demand, an essential demand, segregates from his large stock of merchandise the particular units which serve the customers' especial necessities, and gives to the public the merits of his offering by assuring him in public advertisements that the

"kits" meet all the especial emergencies that may be remedied by the use of the tools purchased. It is only when this is done that the commissioner taxes the articles. The fact that tools of this design, functioning as these tools do, were manufactured prior to the advent of the automobile, and are not now, nor never were, especially designed for use on an automobile, is not in and of itself determinative. See *Cole Storage Battery Co.* v. *United States*, 65 C. Cls. 164; *Walker Mfg. Co.* v. *United States*, 65 C. Cls. 394; *Advance Automobile Accessories Corporation* v. *United States*, 66 C. Cls. 304.

The issue to be solved is dependent upon the facts of each case, and if a manufacturer offers to the automobile trade an essential accessory, one which is universally recognized as an indispensable accompaniment to meet emergencies, or maintain the integrity and workability of the car, he surely falls within the classifications set forth in the regulations of the commissioner. The individual tools which compose the "kits" here involved would be instantly recognized by a car owner at all familiar with its mechanism as both essential and indispensable when needed for use. It is only when so advertised and segregated from the general lot that the taxing acts are invoked by the commissioner. Manufacturers have a definite and express way of avoiding the tax when sold for other and different purposes. See *Magone* v. *Wiederer*, 159 U. S. 555. See also *Universal Battery Co.* v. *United States*, decided by the Supreme Court May 26, 1930 [281 U. S. 580].

The plaintiff alleges in its petition the right to recover $1,688.72, with interest. The statute of limitations precludes a recovery of any sum in excess of $964.56 with interest. The findings disclose the situation with respect to this fact, and the plaintiff has not challenged the correctness of the same.

The petition will be dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

This case was tried before the appointment of WHALEY, *Judge*. He therefore took no part in its decision.

WISCONSIN NATIONAL LIFE INSURANCE CO. v. THE UNITED STATES

[No. K-340. Decided June 16, 1930]

On Demurrer to Petition

Jurisdiction; closing agreement as to taxes; sec. 1106 (b), revenue act of 1926; overpayment made under void statute.—See *Bankers Reserve Life Co.* v. *United States*, *ante*, p. 379.

Statute of limitations; assessment and collection under void statute.— The statute of limitations is jurisdictional and the court is without authority to entertain a suit not brought within the prescribed time, notwithstanding it is to recover a tax paid under a statute declared by the Supreme Court void and unconstitutional.

The Reporter's statement of the case:

Messrs. Edward H. Horton and *Lisle A. Smith*, with whom was *Mr. Charles F. Kincheloe*, for the demurrer.

Messrs. Charles Kerr, *James H. Adams*, *John J. Esch*, and *A. K. Shipe*, opposed.

The opinion states the allegations of the petition.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff brings this suit to recover $2,116.98, income tax paid for 1923, together with interest on $1,058.49 thereof from March 5, 1924, and $1,058.46 thereof from June 12, 1924, and $6,042.91 income tax paid for 1924, and $5,979.18 income tax paid for 1925, with interest from the several dates when payments aggregating these amounts were made.

The amounts mentioned are alleged to have been erroneously and illegally assessed and collected, and are sought to be recovered under the decision of the Supreme Court in *National Life Insurance Co.* v. *United States*, 277 U. S. 508. The amounts in controversy were determined, assessed, collected, and paid under the provisions of sections 242 to 245, inclusive, of the revenue act of 1921 and subsequent revenue acts providing for the determination of the net income of life insurance companies.

As to the amounts determined, assessed, and paid as income tax for 1924 and 1925, plaintiff and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, entered into a closing agreement under the provisions of section 1106 (b) of the revenue act of 1926.

As to the year 1923, the commissioner, upon consideration of a claim for refund and upon audit of the plaintiff's return subsequent to the decision of the Supreme Court in *National Life Insurance Company case*, *supra*, determined that plaintiff had no taxable income for that year and that it had overpaid the amount of $4,933.99 tax and $115.49 interest. He further determined that the refund of $2,116.98 of the total tax paid was barred by the statute of limitation provided in section 284 (b) of the revenue act of 1926. The remaining amount of $2,817.01 of the total overpayment, together with interest of $115.49, was refunded and interest thereon of $578.11 was paid.

The defendant demurs to the petition on the ground, first, that the petition fails to state facts sufficient to constitute a cause of action against the United States; secondly, that the petition fails to state facts sufficient to constitute a cause of action within the jurisdiction of this court.

Plaintiff is a life insurance company organized under the laws of the State of Wisconsin, with its principal office and place of business at Oshkosh.

For the calendar year 1923 plaintiff made an income-tax return showing a taxable income of $33,871.91, upon which a tax at 12½ per cent, amounting to $4,233.93, was duly assessed and paid. March 22, 1927, the Commissioner of Internal Revenue determined the taxable income for this year to be $39,471.91 and on April 30, 1927, made an additional assessment of $700.06 and interest of $115.49, which additional assessment the plaintiff paid. June 21, 1928, the plaintiff filed a claim for refund of $5,049.48, being the total tax and interest assessed and paid for 1923, upon the ground that it was not liable for any tax under the decision of the Supreme Court in *National Life Insurance Co.* v. *United States*, *supra*. Upon consideration of plaintiff's claim for refund and upon further audit of the return for this year, in accordance with the decision in the *National Life Insur-*

ance Company case, the commissioner determined that plaintiff had no income subject to tax, and further determined that there had been an overpayment of $4,933.99 tax and $115.49 interest theretofore assessed.

The commissioner held that $2,116.98, representing two payments of $1,058.49 on March 5, 1924, and $1,058.46 on June 12, 1924, on the tax originally returned and assessed was barred by the statute of limitation contained in section 284 (b) of the revenue act of 1926. The balance of the original and additional assessments of tax and interest, totaling $2,932.50, was refunded and interest thereon in the amount of $578.11 was paid.

For the calendar year 1924 plaintiff was assessed a tax of $6,036.47 and interest of $6.44 on a total net income of $48,291.77, which tax and interest were paid.

Included in and treated as a part of plaintiff's gross income for 1924 was interest of $99,394.88 received by it on tax-exempt securities. Plaintiff's mean reserve fund for 1924 was $2,574,135.34, 4 per cent of which amounted to $102,965.41. In accordance with the provisions of the statute and the regulations of the Commissioner of Internal Revenue there was added to and treated as a part of plaintiff's gross income the income received by it from tax-exempt securities, and in determining the net income the commissioner diminished 4 per cent of the mean of plaintiff's reserve fund of $102,965.41 by the amount of tax-exempt interest received.

For the calendar year 1925 plaintiff was assessed a tax of $5,974.51 and interest of $4.67 on a total net income of $47,796.11.

Included in and treated as a part of plaintiff's income for 1925 was exempt interest of $99,439.24. Plaintiff's mean reserve fund for 1925 was $3,016,710.55, 4 per cent of which amounted to $120,668.42. In accordance with the provisions of the statute and the regulations of the Commissioner of Internal Revenue there was added to and treated as a part of plaintiff's income the exempt interest, and in determining the net income the commissioner diminished 4 per cent of the mean of plaintiff's reserve fund of $120,668.42 by the amount

of the tax-exempt interest received during the year.

The assessments for the taxable years in question were made against plaintiff pursuant to sections 245 (a) (2) of the revenue acts of 1921 and 1924.

After the determination and assessment by the commissioner of the tax and interest due for the years 1924 and 1925, and the payment thereof by the plaintiff, the plaintiff and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, on September 27, 1927, executed an agreement in respect of the tax and interest for these years under and pursuant to the provisions of section 1106 (b) of the revenue act of 1926, which agreement was as follows:

"AGREEMENT AS TO FINAL DETERMINATION AND ASSESSMENT OF TAX

"*This agreement*, made in duplicate under and in pursuance of section 1106 (b) of the revenue act of 1926, by and between Wisconsin National Life Insurance Company, a taxpayer residing at or having its principal office or place of business at 14–16 Washington Boulevard, Oshkosh, Wisconsin, and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury:

"*Whereas* there has been a determination and assessment of twelve thousand twenty-two dollars and nine cents ($12,022.09), as the amount of tax or tax, interest, and penalty due the United States of America from said taxpayer on account of income (character of tax) for the (period covered) years 1924 and 1925;

"*Whereas* said taxpayer has paid the amount of tax or tax, interest, and penalty so determined and assessed, together with all accrued interest or penalty demanded without assessment; and

"*Whereas* said taxpayer has accepted any abatement, credit, or refund based on such determination and assessment, and has accepted the adjustment made with respect to any and all claims filed in connection therewith;

"*Now, this agreement witnesseth*, that said taxpayer and said Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, hereby mutually agree that such determination and assessment shall be final and conclusive.

"*In witness whereof* the above parties have subscribed their names to these presents in duplicate."

At the time the foregoing agreement was executed plaintiff did not know that the National Life Insurance Company had begun an action on July 15, 1925, contesting the validity of section 245 (a) (2) of the revenue act of 1921, nor did it know at the time of the execution of the agreement that said action was pending in the Supreme Court of the United States.

On June 4, 1928, the Supreme Court of the United States, in the case of *National Life Insurance Co.* v. *United States*, *supra*, held that under section 245 (a) (2) of the revenue act of 1921 a life insurance company was entitled to deduct from its gross income 4 per cent of the mean of its reserve without diminution by the amount of tax-exempt interest received. A computation of plaintiff's income for 1924 and 1925 in accordance with the decision of the court in that case would result in deductions of $51,103.11 and $51,643.13, respectively, in excess of the income for these years.

June 23, 1928, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of the entire tax and interest paid for 1924 and 1925 on the ground that it was not liable for any tax under the decision of the *National Life Insurance Company case.* These claims for refund were rejected by the commissioner August 7, 1928, on the ground that he was precluded from making a refund by the closing agreement of September 27, 1927.

With respect to the years 1924 and 1925, as to which there was a closing agreement under section 1106 (b) of the revenue act of 1926, the same contentions are made on behalf of the plaintiff in this case as were made by plaintiff in *Bankers Reserve Life Co.* v. *United States*, K–408, this date decided. [*Ante*, p. 379.] For the reasons stated by the court in the case of *Bankers Reserve Life Co.*, *supra*, it is held that as to the years 1924 and 1925 the defendant's demurrer is well taken and is sustained.

As to the calendar year 1923, there was no closing agreement under the provisions of section 1106 (b) of the revenue act of 1926, but with respect to plaintiff's right to maintain this suit to recover $2,116.98 of the total tax paid for that year the situation is no different. It is admitted

that refund of this amount was barred by the statute of limitation provided in section 284 (b) at the time claim for refund was filed, but it is insisted on behalf of plaintiff that section 284 (b) of the revenue act of 1926, prohibiting a refund of tax unless the claim for refund was filed within the time prescribed by that section (which was not done in this case), can only apply to a tax assessed under a constitutional act and can not apply to amounts illegally collected and held by the Government; that the money which was paid to the Government as a tax for 1923 was not a tax, was without consideration, and is now retained by the Government without warrant of law; that the Government, having admitted that the plaintiff had no taxable income and no tax liability for the year 1923, is now estopped from pleading the statute of limitation as a bar to the plaintiff's right to a refund of the amount in question for that year.

These contentions are without merit. The statute of limitation on the right to a refund or to recover an amount assessed and collected as a tax can not be made to depend upon the question whether there was any legal authority for the assessment and collection. If the plaintiff were correct in its contention in this case the statute of limitation would be practically of no force or effect. The statute of limitation is jurisdictional in this court, and when it appears, as here, that the time within which a person may bring a suit against the United States has expired, or that plaintiff has not complied with the requirements necessary to give him a right to maintain a suit, this court is without jurisdiction to entertain it. The decision of the Supreme Court in the *National Life Insurance Company case* gave life insurance companies that had paid a tax under the provisions of section 245 (a) (2) of the revenue act of 1921 and subsequent acts containing similar sections no greater right to recover the tax so paid, and barred by the statute of limitation, than the right which they or other taxpayers had to recover amounts otherwise erroneously or illegally collected, or collected without authority of law.

The demurrer is sustained and the petition is dismissed. It is so ordered.

Opinion of the Court

WILLIAMS, *Judge*; GREEN, *Judge*; and BOOTH, *Chief Justice*, concur.

This case was tried before the appointment of WHALEY, *Judge*. He therefore took no part in its decision.

GREAT SOUTHERN LIFE INSURANCE CO. v. THE UNITED STATES

[No. K-422. Decided June 16, 1930]

On Demurrer to Petition

Jurisdiction; closing agreement as to taxes; sec. 1106 (b), revenue act of 1926; overpayment made under void statute.—See *Bankers Reserve Life Co.* v. *United States*, *ante*, p. 379.

The Reporter's statement of the case:

Messrs. Lisle A. Smith and *Edward H. Horton*, with whom was *Mr. Charles F. Kincheloe*, for the demurrer. *Mr. Assistant Attorney General Herman J. Galloway* was on the brief.

Messrs. John J. Esch, *Charles Kerr*, and *A. K. Shipe*, opposed.

The material averments of the petition are stated in the opinion.

LITTLETON, *Judge*, delivered the opinion of the court:

In this suit plaintiff seeks to recover $2,522.29, income tax alleged to have been erroneously and illegally collected for the year 1926, under the provisions of sections 242 to 245, inclusive, of the revenue act of 1926, with interest.

Plaintiff bases its right to recover on the decision of the Supreme Court in *National Life Insurance Co.* v. *United States*, 277 U. S. 508.

There was a closing agreement executed by the plaintiff and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, under the provisions of section 1106 (b) of the revenue act of 1926.

Opinion of the Court

The defendant demurs to the petition on the ground that it does not state a cause of action within the jurisdiction of the court.

Plaintiff is a life-insurance company organized under the laws of the State of Texas with principal office and place of business at Houston.

Under section 245 of the revenue act of 1926, as interpreted by the Commissioner of Internal Revenue in his regulations, plaintiff made an income-tax return showing a net income of $385,115.63 and a tax of $48,139.45, which was assessed and paid in four installments of $12,034.87 on March 16, 1927, and three equal installments of $12,034.86 on June 17, September 16, and December 16, 1927. The commissioner audited the return and determined the net income to be $429,388.89 and the total tax for the year at 12½ per cent to be $53,673.61, resulting in a deficiency of $5,534.16, which was assessed. As a result of this assessment plaintiff, on January 12, 1928, paid $5,769.17, $235.01 of the last-mentioned payment being erroneous. The total amount paid by plaintiff on the original and deficiency assessments, including $235.01 above mentioned, amounted to $53,908.62.

Included in and treated as a part of plaintiff's gross income for 1926 was exempt interest of $5,000 received by it from its tax-exempt securities amounting to $146,520. Plaintiff's mean reserve fund for 1926 was $16,508,888.77, 4 per cent of which was $660,355.55. In accordance with the provisions of the statute and the regulations of the Commissioner of Internal Revenue there was added to and treated as a part of plaintiff's gross income the income received by plaintiff from its tax-exempt securities, and in determining plaintiff's net income the commissioner diminished 4 per cent of the mean of plaintiff's reserve fund of $660,355.55 by the amount of tax-exempt interest received by it.

After the determination and assessment by the commissioner of $53,673.61 as the amount of tax due from plaintiff for the calendar year 1926 and the payment by plaintiff of $53,908.62, the plaintiff and the Commissioner of Internal Revenue on March 15, 1928, with the approval of the Sec-

retary of the Treasury, executed an agreement under and pursuant to the provisions of section 1106 (b) of the revenue act of 1926, which agreement was as follows:

"AGREEMENT AS TO FINAL DETERMINATION AND ASSESSMENT OF TAX

"*This agreement*, made in duplicate under and in pursuance of section 1106 (b) of the revenue act of 1926, by and between *Great Southern Life Insurance Company*, a taxpayer residing at, or having its principal office or place of business at *401 Louisiana Street*, *Houston Texas*, and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury:

"*Whereas* there has been a determination and assessment of *fifty-three thousand, nine hundred eight dollars and sixty-two cents* ($53,908.62), as the amount of tax or tax, interest, and penalty due the United States of America from said taxpayer on account of *income* (character of tax) for the *calendar year 1926*. (Period covered);

"*Whereas* said taxpayer has paid the amount of tax, or tax, interest, and penalty as determined and assessed, together with all accrued interest or penalty demanded without assessment; and

"*Whereas* said taxpayer has accepted any abatement, credit, or refund based on such determination and assessment, and has accepted the adjustment made with respect to any and all claims filed in connection therewith;

"*Now, this agreement witnesseth*, That said taxpayer and said Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, hereby mutually agree that such determination and assessment shall be final and conclusive.

"*In witness whereof*, the above parties have subscribed their names to these presents in duplicate."

At the time the foregoing agreement was executed, plaintiff did not know that the National Life Insurance Company had begun an action on July 15, 1925, contesting the validity of section 245 (a) (2) of the revenue act of 1921, nor did it know at the time of the execution of the agreement that said action was pending in the Supreme Court of the United States.

Subsequently, on June 4, 1928, the Supreme Court of the United States in *National Life Insurance Co.* v. *United*

States, *supra*, held that section 245 (a) (2) of the revenue act of 1921 was unconstitutional and that a life insurance company was entitled to deduct from its gross income the full 4 per cent of the mean of its reserve fund required to be held by law without diminution by the amount of interest received by it from tax-exempt securities. Thereafter, in September, 1928, plaintiff filed a claim for refund of $2,522.29, the ground stated in said claim for refund being that the total tax due upon plaintiff's income determined in accordance with the decision of the Supreme Court in *National Life Insurance Company case* would be $2,522.29 less than the amount of $53,673.61 determined and assessed by the commissioner and paid by the plaintiff as the tax due and owing for the taxable year. The claim for refund was denied by the commissioner November 3, 1928.

A computation of plaintiff's income for 1926, by allowing as deductions the total amount of the exempt interest of $5,000 and the total of the 4 per cent of the mean reserve fund, of $660,355.55, in accordance with the decision of the court in *National Life Insurance Company case*, together with other deductions not in controversy, would result in a net income of $409,210.58 upon which a tax at 12½ per cent would be $51,151.32, or $2,522.29 less than $53,673.61 determined and assessed against plaintiff as the tax due and owing for 1926.

The same contentions made on behalf of the plaintiff in *Bankers Reserve Life Company* v. *United States*, K–408, this date decided [*ante*, p. 379], are made on behalf of the plaintiff in this case.

The fact that plaintiff paid $235.01 more than the total tax determined and assessed by the commissioner, and due for the year 1926, and the fact that this amount was included in the total amount specified in the closing agreement of March 15, 1928, does not nullify the entire agreement or give this court jurisdiction to annul, modify, or set aside the determination or assessment of the commissioner. This amount is not in controversy and no claim for refund was filed therefor.

For the reasons stated in *Bankers Reserve Life Co.* v. *United States*, *supra*, the demurrer is sustained and the petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

This case was tried before the appointment of WHALEY, *Judge*. He therefore took no part in its decision.

HYATT ROLLER BEARING CO. v. THE UNITED STATES

REMY ELECTRIC MANUFACTURING CO. v. SAME

PERLMAN RIM CORPORATION v. SAME

DAYTON ENGINEERING LABORATORIES CO. v. SAME

NEW DEPARTURE MANUFACTURING CO. v. SAME

[Nos. B-426, B-427, B-428, B-429, B-430. Decided October 20, 1930]

On the Proofs

Income and profits tax; exhaustion of patents; application before March 1, 1913; issuance thereafter.—In suits for refund of income and profits tax the recognized method for computing allowances for exhaustion of patents issued subsequent to March 1, 1913, upon the basis of the fair market value of the applications made prior to that date, is for the allowance to begin from the date of issuance of the patent and to be computed upon the basis of the remaining life thereof.

Same; purchase of patent right with purchaser's stock; conversion of asset; taxable income.—Where a taxpaying corporation purchases with its stock certain patent rights including the right to whatever damages might be recovered for infringement, it was a capital transaction, and receipt by the company thereafter of a check from the infringer in settlement of all claims for profits and damages was merely a conversion of the asset so acquired, and not taxable income.

Same; payment of tax without protest; right to sue for refund.—Section 252 of the revenue act of 1918 is mandatory in its provision that any overpayment of tax shall be refunded or credited, and sections 1316 and 1318 of the revenue act of 1921

authorize suits for refund if claims for refund are filed. Under these sections and section 145 of the Judicial Code the right of plaintiff to maintain suit and the authority of the court to render judgment for refund can not be made to depend upon whether the tax was paid under protest.

The Reporter's statement of the case:

Mr. Charles R. Carroll for the several plaintiffs. *Messrs. George E. Holmes*, *Randolph E. Paul*, *Donald Havens*, *Henry Moakley*, *John Thomas Smith*, and *Bright*, *Thompson*, *Hinrichs & Warren* were on the briefs.

Mr. Edward C. Lake, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Fred K. Dyar* was on the brief.

The following are the facts as found by the court:

I. The United Motors Corporation was organized under the laws of New York, May 11, 1916. Prior to May, 1917, its business was the acquisition and holding of stock of companies engaged in the manufacture and sale of automobile parts, and thereafter this company itself engaged in the manufacture of automobile parts and continued to acquire stock of other companies so engaged from the date of organization. The authorized capital stock of the United Motors was at first 1,200 shares of no par value. On May 22, 1916, the authorized stock was increased to 1,200,000 shares of no par value, of which 1,195,000 shares were designated as Class A and had no voting power, and 5,000 shares were designated as class B voting stock. May 16, 1917, by amendment of the certificate of incorporation, this classification of shares was eliminated and all shares were given equal voting rights.

May 22, 1916, W. C. Durant and Louis G. Kaufman made an offer in writing to the United Motors to sell to it the control of certain companies engaged in the automobile parts business, as follows:

"We hereby offer to purchase and pay for 5,000 shares of the class B stock and 1,125,000 shares of the Class A stock of your company by delivering to your company the following securities upon the following terms and conditions:

"(a) 1,500 shares of the common capital stock of the Dayton Engineering Laboratories Company, a corporation of Ohio.

"(b) 7,963 shares of the capital stock of the Remy Electric Company, a corporation of Indiana.

"(c) 3,997 shares of the capital stock of the Hyatt Roller Bearing Company, a corporation of New Jersey.

"(d) 25,000 shares of the common capital stock of the New Departure Manufacturing Company, a corporation of Connecticut.

"(e) 97,000 shares of the common stock of the Perlman Rim Corporation, a New York corporation.

"(f) 3,000 shares of the class A stock of the Perlman Rim Corporation, a New York corporation.

"If we shall be unable to deliver all of the shares set forth above, there shall be reserved by you for future delivery to us the following amounts:

"(1) Four and one-fourth (4¼) shares of your class A stock for each share of New Departure common stock not delivered.

"(2) Two shares (2) of your class A stock for each share of Perlman Rim stock not delivered."

This offer was presented to the stockholders of United Motors at a meeting held May 22, 1916, at which a resolution was adopted authorizing the board of directors to accept the offer and to issue and deliver the company's stock in payment therefor. On the same date the board of directors of United Motors accepted the offer in its terms and authorized the issuance and delivery of certificates for 5,000 shares of class B stock and 1,195,000 shares of class A stock to Louis G. Kaufman and W. C. Durant or their order upon delivery of the stock of the corporations mentioned. The transaction was carried out as will hereinafter be set forth in more detail.

II. The Hyatt Roller Bearing Company, a New Jersey corporation, was organized November 7, 1892, with its principal place of business at Harrison. Until May 1, 1917, it was engaged in the manufacture and sale, and thereafter in the sale, of roller bearings for automobiles and other purposes.

From April 23, 1900, until June 26, 1917, the authorized capital stock of the Hyatt Roller Bearing Company consisted of 4,000 shares of common stock and 1,000 shares of preferred stock, both of the par value of $100 a share.

June 26, 1917, the stockholders reduced the authorized capital stock of the Hyatt Company to 1,500 shares.

From May 31, 1916, to May 1, 1917, the entire outstanding capital stock of the Hyatt Company consisted of 3,997 shares of common stock, all of which was acquired by the United Motors June 6, 1916, in the manner hereinafter set forth, and was owned by said United Motors until May 1, 1917. On the last-mentioned date United Motors surrendered 2,497 shares of this stock, which were retired and not reissued, but retained the balance of the stock. Upon the surrender of said 2,497 shares of stock the Hyatt Company transferred to United Motors its entire assets with the exception of the following:

Buildings		$78, 923. 26
Office and laboratory furniture and fixtures		22, 650. 31
Automobiles		2, 500. 90
		104, 074. 47
Less reserve for depreciation		5, 784, 31
Total property and plant		98, 290. 16
Cash	$45, 603. 30	
Accounts receivable	5, 983. 03	
United Motors Corporation	123. 51	
Current assets		51, 709. 84
Total		150, 000. 00

United Motors Corporation assumed all the debts, liabilities, and accounts payable of the Hyatt Company, and, thereupon, constituted the Hyatt Roller Bearing Division of United Motors to conduct the business, and such division did thereafter conduct the business theretofore conducted by the Hyatt Roller Bearing Company.

At all times herein mentioned until April 30, 1917, the Hyatt Roller Bearing Company owned and employed in its business a large number of patents relating to antifriction bearings, of which the principal patent was #958,144 issued April 17, 1910, upon the application of Charles S. Lockwood relating to improvements in the processes for making helical rolls for use in roller bearings. May 1, 1917, United Motors

acquired all the patents owned by Hyatt Roller Bearing Company through a partial liquidation of the Hyatt Company and thereafter owned and employed the same in its business. The Lockwood patent, #958,144, afforded a monopoly during its life of the helical roller bearing business.

The fair market value on March 1, 1913, of the patents owned by the Hyatt Roller Bearing Company, of which the Lockwood patent was the principal one, was $4,000,000. The reasonable allowance for ten months of the taxable year for the exhaustion of the patents owned by the Hyatt Roller Bearing Company, as aforesaid, computed upon the life of the principal patent, #958,144, of 14 years and 2 months, was $235,294.12.

On May 1, 1917, United Motors Corporation acquired in partial liquidation of the Hyatt Roller Bearing Company all of the patents owned by the latter company at a cost of $6,923,076.92, at which time the remaining life of the patents computed upon the basis of the principal patent, #958,144, was ten years, and the reasonable allowance for exhaustion of said patents for the last two months of the fiscal year ended June 30, 1917, was $158,384.62.

The Commissioner of Internal Revenue, in the determination of allowances to the plaintiffs and other members of the consolidated group for exhaustion, wear, and tear of physical assets used in businesses, used the values or costs as determined by him as the basis for such allowances. In computing such allowances the Commissioner of Internal Revenue applied the rates normally used for depreciation of such properties to the various classes of depreciable property. Plaintiffs claim that the values upon which the commissioner computed his allowances were inaccurate and that the allowances for exhaustion for the taxable year should be at rates in excess of those used by the commissioner. The plants and properties were in almost constant operation, and practically throughout the entire taxable year the corporations were compelled to employ to a large degree in the operation of their plants and equipment persons who were unskilled and incompetent properly to operate and care for the various classes of machinery and equipment. Great effort was made by the corporations to maintain their prop-

Reporter's Statement of the Case

erties in good condition and to maintain their machinery and equipment in a proper state of efficiency, but the circumstances and conditions were such that they were not able properly to do this, and the exhaustion, wear, and tear of the buildings, machinery, and equipment were greater than under ordinary circumstances.

Some of the depreciable property owned by plaintiff was acquired prior to March 1, 1913, and a portion subsequent thereto. There is no satisfactory proof that the values and costs of depreciable assets owned by plaintiff on March 1, 1913, and acquired subsequent to that date as determined by the Commissioner of Internal Revenue were incorrect.

By reason of the conditions existing in the taxable year, the reasonable allowance for exhaustion, wear, and tear of the plant and equipment of the Hyatt Roller Bearing Company and the Hyatt Roller Bearing Division of United Motors upon the values determined by the Commissioner of Internal Revenue was, for the buildings, 2½ per cent; machinery and equipment, 15 per cent; office and laboratory equipment, 15 per cent; tools, dies, and patterns, 100 per cent; automobiles, 25 per cent.

The Hyatt Roller Bearing Company upon its return for the taxable year paid income and profits tax for the fiscal year ended June 30, 1917, of $30,580.84 on December 10, 1917, and $131,619.14 on June 15, 1918, totaling $162,199.98. This tax was paid without specific protest.

June 10, 1922, this company duly filed a claim for refund of $97,239.98, or such greater amount as might be legally refundable. This claim was either not acted upon or was denied by the Commissioner of Internal Revenue and this suit was timely instituted.

In 1923 the Commissioner of Internal Revenue made a jeopardy assessment of an additional tax against this company. The company filed a claim for abatement, and subsequently, February 13, 1925, the Commissioner of Internal Revenue allowed the claim in abatement in part. The company instituted a proceeding before the United States Board of Tax Appeals contesting the correctness of the commissioner's determination of an additional tax. On May 6,

1929, the Board of Tax Appeals entered its decision that collection of the proposed additional tax was barred by the statute of limitation and dismissed the proceeding.

III. The Remy Electric Manufacturing Company, an Indiana corporation, with principal place of business at Anderson, was organized October 5, 1901. Until June 1, 1917, its business was the manufacture and sale, and, after that date, the sale of automotive electric equipment and similar articles.

After October 7, 1912, and at all times herein mentioned, the authorized capital stock of this company consisted of 10,000 shares of common and 5,000 shares of preferred stock of the par value of $100 each.

From May 1, 1915, to June 1, 1917, the entire outstanding stock of this company consisted of 7,963 shares of common stock of $100 par value, all of which was acquired on June 6, 1916, by United Motors in the manner hereinafter set out, and was owned by said United Motors until June 1, 1917.

On the last-mentioned date United Motors surrendered 5,963 shares of common stock of the Remy Company, which were thereupon retired and not reissued, but retained the balance of 2,000 shares. Upon the surrender of said 5,963 shares the Remy Company transferred to the United Motors its entire assets with the exception of the following:

Real estate, plant, and equipment	$175, 268. 51	
Less reserve for depreciation	17, 222. 81	
		$158, 045. 70
Cash		2, 000. 00
Accounts receivable, Remy Electric Division		39, 954. 30
In all		200, 000. 00

United Motors assumed all the debts, liabilities, and accounts payable of the Remy Company and thereupon constituted the Remy Electric Division of United Motors to conduct the business, and such division did thereafter and throughout the taxable year conduct the business theretofore carried on by the Remy Electric Manufacturing Company.

Reporter's Statement of the Case

The allowance to which Remy Electric Manufacturing Company was entitled for exhaustion of patents owned by it during the taxable year was $7,335.66, and the allowance to which the Remy Electric Division of United Motors Corporation was entitled for exhaustion of patents for the month of June, 1917, was $1,057.82.

Some of the depreciable property owned by plaintiff was acquired prior to March 1, 1913, and a portion subsequent thereto. There is no satisfactory proof that the values and costs of depreciable assets owned by plaintiff on March 1, 1913, and acquired subsequent to that date, as determined by the Commissioner of Internal Revenue, were incorrect.

By reason of the conditions existing in the taxable year, the reasonable allowance for exhaustion, wear, and tear of the plant and equipment of the Remy Electric Manufacturing Company and the Remy Electric Division of United Motors upon the values determined by the Commissioner of Internal Revenue was, for the buildings, 2½ per cent; machinery and equipment, 15 per cent; furniture and fixtures, 15 per cent; dies, jigs, tools, patterns, and drawings, 100 per cent; automobiles, 33⅓ per cent.

The Remy Electric Manufacturing Company upon its returns for the taxable year paid income and profits tax for the fiscal year ended June 30, 1917, of $15,736.53 on December 12, 1917, and $40,467.59 on June 17, 1918, totaling $56,204.12. This tax was paid without specific protest.

June 10, 1922, this company duly filed a claim for refund of $23,404.32, or such greater amount as might be legally refundable. This claim was either not acted upon or was denied by the Commissioner of Internal Revenue and this suit was timely instituted.

In 1923 the Commissioner of Internal Revenue made a jeopardy assessment of an additional tax against this company. The company filed a claim for abatement and subsequently, February 13, 1925, the Commissioner of Internal Revenue allowed the claim in abatement in part. The company instituted a proceeding before the United States Board of Tax Appeals contesting the correctness of the commissioner's determination of an additional tax. On May 6, 1929, the Board of Tax Appeals entered its decision that

collection of the proposed additional tax was barred by the statute of limitation and dismissed the proceeding.

IV. The Dayton Engineering Laboratories Company, an Ohio corporation with principal place of business at Dayton, was organized July 22, 1909, and was engaged in the manufacture and sale of automotive electrical equipment.

On and after May 1, 1916, the authorized capital stock of this company consisted of 1,500 shares of common and 2,000 shares of preferred stock, of a par value of $100 each. All voting power was vested in the common stock. The entire authorized capital stock of the Dayton Company was outstanding at all times herein mentioned. United Motors acquired the entire 1,500 shares of common stock of the Dayton Company in the manner hereinafter set out and on June 6, 1916, and thereafter, was the owner of such stock.

The Dayton Engineering Laboratories Company acquired and thereafter at all times referred to herein owned and employed in its business a license from Conrad Hubert (said license being exclusive except as to the grantor, who did not engage in business) under Coleman Patent #745,-157 issued November 24, 1903, and Coleman Patent #842,-827 issued January 29, 1907, both relating to electric starters for automobiles, such license being for the life of said patents. The fair market value of the license owned by this company for these patents on March 1, 1913, was $4,000,000. Coleman Patent #842,827, January 29, 1907, was the principal of these patents and on March 1, 1913, it had a remaining life of 10 years and 11 months, and the reasonable allowance to the Dayton Company for exhaustion of its license for the taxable year was $366,412.21.

The Dayton Company also acquired at the respective dates of filing, and thereafter owned and employed in its business, the following patents and applications for patents:

(1) Application of Charles F. Kettering, No. 633443, filed June 15th, 1911, relating to improvements in engine-starting devices, and Letters Patent No. 1150523 issued thereon August 17th, 1915.

(2) Application of Charles F. Kettering, No. 621512, filed April 17th, 1911, relating to improvements in engine-

starting, lighting, and ignition systems, and Letters Patent No. 1171055 issued thereon February 8th, 1916.

(3) Application of Charles F. Kettering, No. 699400, filed May 24th, 1912, relating to improvements in electric machines, and Letters Patent No. 1191083 issued thereon July 11th, 1916.

(4) Application of Charles F. Kettering, No. 564737, filed June 3d, 1910, relating to improvements in ignition systems, divided and filed as No. 699536, filed on May 24th, 1912, and Letters Patent No. 1233369 issued thereon July 17th, 1917.

(5) Application of Charles F. Kettering, No. 721237, filed Sept. 19th, 1912, relating to improvements in engine-starting devices, and Letters Patent No. 1240348 issued thereon Sept. 18th, 1917.

(6) Application of Kettering and Chryst, No. 732483, filed November 20th, 1912, relating to improvements in systems of selective electrical distribution, divided and filed as No. 94664, filed May 1st, 1916, and Letters Patent No. 1264943 issued thereon May 7th, 1918.

The fair market value on March 1, 1913, of the aforementioned patents and applications for patents was $1,000,-000. The principal patent in the group of patents and applications was the Kettering Patent #1171055 relating to improvements in engine-starting, lighting, and ignition systems, for which application was filed April 17, 1911, on which patent was issued February 8, 1916. The reasonable allowance for the taxable year for the exhaustion of the patents in the last-mentioned group which had been issued to the Dayton Company to the taxable year, computed upon the life of the principal patent, #1171055, was $58,823.53.

Some of the depreciable property owned by plaintiff was acquired prior to March 1, 1913, and a portion subsequent thereto. There is no satisfactory proof that the values and costs of depreciable assets owned by plaintiff on March 1, 1913, and acquired subsequent to that date, as determined by the Commissioner of Internal Revenue, were incorrect.

By reason of the conditions existing in the taxable year, the reasonable allowance for exhaustion, wear, and tear of

Reporter's Statement of the Case

the plant and equipment of the Dayton Engineering Laboratories Company upon the values determined by the Commissioner of Internal Revenue was, for the buildings 2½ per cent; machinery and equipment, 15 per cent; furniture and fixtures, 15 per cent; automobiles and trucks, 25 per cent; tools, dies, jigs, patterns, and drawings, 100 per cent.

The Dayton Engineering Laboratories Company upon its returns for the taxable year paid an income and profits tax for the fiscal year ended June 30, 1917, of $25,526.22 on December 12, 1917, and $66,275.92 on January 4, 1918, totaling $91,802.14. This tax was paid without specific protest.

June 10, 1922, this company duly filed a claim for refund of $47,922.14, or such greater amount as might be legally refundable. This claim was either not acted upon or was denied by the Commissioner of Internal Revenue, and this suit was timely instituted.

In 1923 the Commissioner of Internal Revenue made a jeopardy assessment of an additional tax against this company. The company filed a claim for abatement and subsequently, February 13, 1925, the Commissioner of Internal Revenue allowed the claim in abatement in part. The company instituted a proceeding before the United States Board of Tax Appeals contesting the correctness of the commissioner's determination of an additional tax. On May 6, 1929, the Board of Tax Appeals entered its decision that collection of the proposed additional tax was barred by the statute of limitation, and dismissed the proceeding.

V. The New Departure Manufacturing Company, a Connecticut corporation, was organized in 1899 and was engaged principally in the manufacture and sale of ball bearings, coaster brakes, cyclometers, bells, and similar devices.

On and after May 1, 1916, the authorized capital stock of this company consisted of 25,000 shares of common stock and 5,000 shares of preferred stock, of the par value of $100 each. All voting power was vested in the common stock.

On June 30, 1916, the entire authorized capital stock of the New Departure Company was issued and outstanding.

June 6, 1916, the United Motors acquired for its stock in the manner hereinafter set forth 23,038 shares of the common stock of New Departure Manufacturing Company.

Thereafter the United Motors acquired on the several dates specified, and for the amounts stated, the following shares:

Date	Cash paid	Number of shares	Date	Cash paid	Number of shares
October 31, 1916	$30,750.00	110	March 8, 1917	$2,475.00	9
November 30, 1916	34,625.00	125	March 17, 1917	1,365.00	5
December 30, 1916	3,300.00	12	March 30, 1917	35,750.00	130

All such stock was thereafter owned by United Motors.

VI. The New Departure Realty Company, a Connecticut corporation, was organized June 20, 1916, as a realty holding corporation, with an authorized capital stock of 2,500 shares of a par value of $100 each. With the exception of three qualifying shares, all this stock was subscribed for at par and paid for in cash by the New Departure Manufacturing Company prior to June 30, 1917, and was owned and held at all times herein mentioned by that company.

Prior to March 1, 1913, the New Departure Manufacturing Company acquired and thereafter owned and employed in its business the applications upon which were issued Letters Patent #850077, April 9, 1907, of Harry P. Townsend, and letters Patent #1069603 issued August 5, 1913, on application filed by James S. Copeland, both relating to bicycle and motor-cycle coaster brakes. This company has at all times owned said applications and the patents issued thereon. It also owned a number of supporting patents relating to the same business, of which it enjoyed a monopoly except to the extent that it granted licenses to others.

On March 1, 1913, the fair market value of the aforementioned patents and applications for patent was $1,750,000. Copeland Patent #1069603, issued August 5, 1913, was the principal and most important of these patents. The reasonable allowance for the taxable year for the exhaustion of these patents, computed upon said March 1, 1913, value, upon the basis of the life of the principal patent mentioned, was $102,941.18.

Prior to March 1, 1913, the New Departure Manufacturing Company also acquired and thereafter owned and employed in its business Letters Patent #921464, issued May

11, 1909, upon the application of Albert F. Rockwell relating to antifriction bearings and particularly double-roll ball bearings supporting both thrust and radial loads. The fair market value of this patent on March 1, 1913, was $750,000, at which time it had a remaining life of 13 years and two months. The reasonable allowance for the taxable year for exhaustion of this patent was $56,962.02.

Some of the depreciable property owned by plaintiff was acquired prior to March 1, 1913, and a portion subsequent thereto. There is no satisfactory proof that the values and costs of depreciable assets owned by plaintiff on March 1, 1913, and acquired subsequent to that date, as determined by the Commissioner of Internal Revenue, were incorrect.

By reason of the conditions existing in the taxable year the reasonable allowance for exhaustion, wear, and tear of the plant and equipment of the New Departure Manufacturing Company upon the values determined by the Commissioner of Internal Revenue was, for the buildings, brick, and concrete, 2½ per cent; buildings, temporary, 5 per cent; machinery and equipment, 11.1 per cent; furniture and fixtures, 15 per cent; additions to leased property, 5 per cent.

The New Departure Manufacturing Company upon its returns for the taxable year paid income and profits tax for the fiscal year ended June 30, 1917, of $94,345.83 on December 12, 1917, $44,066.77 on June 15, 1918, and $2,026.10 on May 2, 1921, totaling $140,438.70. This tax was paid without specific protest.

June 10, 1922, this company duly filed a claim for refund of $69,173.01, or such greater amount as might be legally refundable. This claim was either not acted upon or was denied by the Commissioner of Internal Revenue and this suit was timely instituted.

VII. The Perlman Rim Corporation was organized March 15, 1916, under the laws of New York, with principal place of business at New York City, and continued in existence throughout the taxable year. It was engaged in the manufacture and sale of demountable automobile rims.

The authorized capital stock of this company consisted of 3,000 shares of class A stock having the entire voting power

and 97,000 shares of common stock without voting rights; both classes being of no par value.

March 15, 1916, Louis H. Perlman made a written offer to Perlman Rim Corporation, as follows:

"I hereby agree to transfer and assign to your company for $25,000 a year during the life of the patent hereinafter mentioned and 3,000 shares of its class A stock and 97,000 shares of its common stock, the following letters patent and applications for letters patent, namely:

"U. S. Letters Patent No. 1052270, granted to me February 4th, 1913, covering improvement in wheels;

"Serial No. 701214, for improvements in demountable-rim wheels, filed by me in the U. S. Patent Office on June 7th, 1912;

"Serial No. 746078, for improvements in processes of applying pneumatic tires to demountable rims, filed by me in the U. S. Patent Office on February 3rd, 1913;

"Serial No. 483815, for improvement in wheels, filed by me in the U. S. Patent Office on March 16th, 1909; and

"Serial No. 823764, for improvement in wheels, filed by me in the U. S. Patent Office on March 10th, 1914;

"Together with all my rights in and to the said patent and in and to any and all patents or inventions owned by me affecting wheels or rims, together with all improvements thereon and substitutes therefor that at any time may be made by me, including also the right or claim for profits or damages for past infringements.

"I also agree to donate to the treasury of the company for the purpose of procuring working capital and other proper corporate purposes 2,000 shares of the class A stock and 62,000 shares of the common stock of said corporation."

This offer was accepted on the date made. Pursuant to the offer and acceptance, the corporation on March 15, 1916, acquired from Louis H. Perlman, in the manner stated, Perlman patent #1052270, issued February 4, 1913, and the applications recited in said offer and the rights to all claims for past infringement. At the time of acquisition of this patent and the applications the United States courts had held the patent last above mentioned to have been infringed by the Standard Welding Company, afterwards the Standard Parts Company, and had ordered an accounting. The Perlman Rim Corporation issued to Louis H. Perlman, in consideration for the patents and the applications, 35,000

shares of its common stock, and 1,000 shares of its class A stock, and agreed to, and did, pay him $25,000 a year during the remaining life of the patent. The fair market value of the stock of the Perlman Rim Corporation issued for this patent and claims for damages and profits for prior infringement was $137.50 a share. The cost to the corporation of said patent on March 15, 1916, was $3,816,850. Upon this cost the Perlman Corporation is entitled to a deduction in the taxable year for the exhaustion of this patent.

April 17, 1916, pursuant to an offer made to and accepted by the board of directors of the Perlman Corporation on March 20, 1916, W. C. Durant and Louis G. Kaufman purchased from the Perlman Corporation 58,000 shares of common stock and 2,000 shares of class A voting stock for which they paid $3,000,000 in cash.

From and after April 17, 1916, the entire outstanding capital stock of Perlman Rim Corporation consisted of 3,000 shares of class A voting stock and 93,000 shares of common, nonvoting stock.

June 6, 1916, the United Motors acquired in the manner hereinafter set forth 3,000 shares of class A stock and 10,000 shares of common stock of the Perlman Rim Corporation. Thereafter, from time to time during the taxable year, the United Motors acquired for its stock additional shares of Perlman stock as hereinafter set forth.

Subsequent to the organization of Perlman Rim Corporation and the acquisition by it from Louis H. Perlman of Patent #1052270, together with the rights to damages and profits for past infringement, the Perlman Corporation thereafter received from the Standard Parts Company 10,000 shares of the latter's stock which was held by the Perlman Company as security for the claim for damages and profits for infringement which the Perlman Corporation had acquired from Louis H. Perlman for its stock. On December 6, 1916, the Standard Parts Company issued its check for $1,010,000 to the Perlman Corporation in settlement of all claims for infringement, and, at the same time, the Perlman Corporation issued its check for a like amount to the Standard Parts Company for 10,000 shares of Standard Parts Company stock.

The allowance made by the Commissioner of Internal Revenue to the Perlman Corporation of $336.71 for exhaustion, wear, and tear of physical assets for the taxable year was reasonable.

The Perlman Rim Corporation upon its returns for the taxable year paid an income and profits tax for the fiscal year ended June 30, 1917, of $25,328.51. This tax was paid without specific protest.

June 10, 1922, this corporation duly filed a claim for refund of $25,328.51, or such greater amount as might be legally refundable. This claim was either not acted upon or was denied by the Commissioner of Internal Revenue, and this suit was timely instituted.

In 1923 the Commissioner of Internal Revenue made a jeopardy assessment of an additional tax against this corporation. The corporation filed a claim for abatement and subsequently, February 13, 1925, the Commissioner of Internal Revenue allowed the claim in abatement, and determined an overassessment. The corporation instituted a proceeding before the United States Board of Tax Appeals contesting the correctness of the commissioner's determination. On May 6, 1929, the Board of Tax Appeals entered its decision that collection of the proposed additional tax was barred by the statute of limitation and dismissed the proceeding.

VIII. The Jackson Rim Company was a subsidiary of the Perlman Corporation.

By reason of the conditions existing in the taxable year, the reasonable allowance for exhaustion, wear, and tear of the plant and equipment of the Jackson Rim Company upon the values determined by the Commissioner of Internal Revenue was, for the buildings, 2½ per cent; machinery and equipment, 10 per cent; furniture and fixtures, 10 per cent; autos and trucks, 25 per cent.

IX. The Harrison Radiator Corporation was organized under the laws of New York, December 2, 1916. It was engaged in the manufacture of radiators for automobiles. Its authorized capital stock consisted of 10,000 shares of no par value common stock and 10,000 shares of 7 per cent cumulative preferred stock of the par value of $100 a share. The

preferred stock had no voting rights except in certain contingencies, none of which arose. All of the common stock was outstanding.

December 26, 1916, United Motors purchased 8,000 shares of common stock of the Harrison Corporation for $268,340 in cash, and on March 30, 1918, an additional 2,000 shares for $120,000 in cash. Between February 17 and May 14, 1917, United Motors purchased 3,000 shares of preferred stock for $285,000 cash, and on July 31, 1917, 1,000 shares of preferred stock for $97,500 cash.

By reason of the conditions existing in the taxable year, the reasonable allowance for exhaustion, wear and tear of the plant and equipment of the Harrison Radiator Corporation upon the values determined by the Commissioner of Internal Revenue was, for the buildings, 2½ per cent; machinery and equipment, 15 per cent; furniture and fixtures, 15 per cent; patterns, dies, and drawings, 100 per cent.

X. The United Motors Service, Inc., a Delaware corporation, was organized in November, 1916, with principal place of business at Detroit, Michigan. It was engaged principally in the distribution and the servicing of products manufactured by affiliated companies and divisions of United Motors Corporation.

The authorized capital stock of this corporation was $50,000, consisting of 5,000 shares of stock of the par value of $10 each, all of which stock was issued and outstanding and was owned by the United Motors Corporation.

XI. On June 6, 1916, W. C. Durant and Louis G. Kaufman substantially complied with their offer to the United Motors Corporation of May 22, 1916, as set forth in Finding I, by delivering to that corporation through the Guaranty Trust Company the following common stocks: Hyatt Roller Bearing Company, 3,918 shares; Remy Electric Manufacturing Company, 7,963 shares; Dayton Engineering Laboratories Company, 1,500 shares; New Departure Manufacturing Company, 23,038 shares; Perlman Rim Corporation, 10,000 common and 2,000 class A (voting). On June 14, 1916, 79 additional shares of common stock of the Hyatt Roller Bearing Company were paid in to the United Motors. On

Reporter's Statement of the Case

June 6, 1916, United Motors Corporation complied with its commitment to Durant and Kaufman by issuing and delivering to them or their order 932,660 shares of its class A and 5,000 shares of its voting stock. It also issued to John Thomas Smith for legal services rendered the corporation in its formation 1,000 shares of class A stock, totaling 938,660 shares, as follows:

		Shares	Shares
Voting stock:			
To L. G. Kaufman		2,500	
To W. C. Durant		2,500	
			5,000
Class A stock:			
To Dominick & Dominick, for account of Kaufman and Durant		390,000	
To Alfred P. Sloan, jr., for account of Kaufman and Durant		135,000	
To Stoughton A. Fletcher, for account of Kaufman and Durant (sh.)	80,000		
Less (returned)	10,000		
		70,000	
To E. A. Deeds and C. F. Kettering, for account of Kaufman and Durant		60,000	
To various stockholders of New Departure Mfg. Co., for account of Kaufman and Durant		40,000	
To Louis H. Perlman, for account of Kaufman and Durant		2,000	
		697,000	
To L. G. Kaufman (sh.)	121,330		
Less (returned)	3,500		
		117,830	
To W. C. Durant (sh.)	121,330		
Less (returned)	3,500		
		117,830	
To John T. Smith, services		1,000	
Total class A		933,660	
			933,660
Total			938,660

Upon the issuance of the aforementioned United Motors stock, 8,340 shares of class A stock were reserved for 1,962 shares of New Departure Manufacturing Company stock, and 174,000 shares of class A stock were reserved for 87,000

shares of Perlman Rim Corporation stock then outstanding. No additional shares of stock of the New Departure Manufacturing Company in addition to said 23,038 shares of common stock were acquired by United Motors by exchange.

The actual cash value of the aforementioned stocks of the plaintiffs paid in to the United Motors Corporation for its stock, as aforesaid, was $60,947,900. The assets owned by the plaintiffs had an actual cash value of at least this amount. The actual cash value of the stock of United Motors Corporation issued to plaintiffs in exchange for the above-mentioned shares of their stock was $65 a share. The actual cash value of services rendered by John Thomas Smith to United Motors Corporation in the organization of that company was $65,000, and the 1,000 shares of United Motors class A stock issued to him in payment for those services had an actual cash value of $65,000.

The offer made by Durant and Kaufman on May 22, 1916, to the stockholders of the Perlman Rim Corporation was as follows:

"A proposition has been made on behalf of United Motors Corporation to exchange its stock for Perlman Rim Corporation stock on the basis of two shares of its class A stock for one share of Perlman Rim Corporation common, on condition that the United Motors Corporation stock received in exchange shall be deposited with the Guaranty Trust Company, of No. 140 Broadway, New York City, for a period of six months from May 25th, 1916, unless sooner released by the undersigned.

"The United Motors Corporation has been incorporated under the laws of the State of New York, with a capital divided into 1,200,000 shares of no par value, of which 1,195,000 shares, designated as class A stock, have all the rights of class B stock except the right to vote.

"Arrangements have been made by United Motors Corporation to acquire controlling stock interests in the following companies:

"The New Departure Company, of Bristol, Conn.,

"The Hyatt Roller Bearing Company, of Harrison, N. J.,

"The Dayton Engineering Laboratories Company, of Dayton, Ohio,

"The Remy Electric Company, of Anderson, Indiana, and

"The Perlman Rim Corporation, of New York.

"In the event of your desiring to accept the foregoing offer, please forward, subject to the order of the undersigned,

your stock certificates, endorsed in blank, to the Guaranty Trust Company, No. 140 Broadway, New York City, which will issue its receipts therefor.

"To avail of this offer, stock certificates must be so deposited with the Guaranty Trust Company on or before June 15th, 1916."

In acceptance of this offer and extensions thereof, and in addition to the 13,000 shares of Perlman Rim Corporation stock paid in by Durant and Kaufman as aforesaid, 52,468 shares of Perlman Corporation stock were paid in to the United Motors Corporation between June 6 and June 15, 1916, both dates inclusive, which said 52,468 shares had an actual cash value of $7,222,517.75, as follows:

Date	Number of shares	Amount	Date	Number of shares	Amount
June 6, 1916	3,275	$512,537.50	June 12, 1916	230	$33,005.00
June 7, 1916	209	32,395.00	June 13, 1916	7,770	1,041,180.00
June 8, 1916	1,225	184,056.25	June 14, 1916	5,680	781,000.00
June 9, 1916	1,200	166,800.00	June 15, 1916	32,879	4,471,544.00

Thereafter, between June 19, 1916, and June 15, 1917, 29,087 shares of Perlman Rim Corporation stock were paid in to the United Motors Corporation for its stock, which said 29,087 shares had a total actual cash value at the time paid in of $3,852,459.25, as follows:

Date	Number of shares	Amount	Date	Number of shares	Amount
June 19, 1916	1,500	$220,500.00	Oct. 30, 1916	55	$6,902.50
June 27, 1916	306	39,321.00	Oct. 31, 1916	5	623.75
July 17, 1916	50	6,575.00	Nov. 2, 1916	20	2,612.50
July 20, 1916	210	28,927.50	Nov. 11, 1916	20	2,480.00
July 21, 1916	40	5,575.00	Nov. 14, 1916	10	1,241.25
July 26, 1916	195	26,251.88	Nov. 20, 1916	310	38,905.00
Aug. 1, 1916	55	7,376,87	Nov. 22, 1916	40	5,060.00
Aug. 3, 1916	410	50,942.50	Dec. 1, 1916	35	4,165.00
Aug. 7, 1916	25	3,206.25	Dec. 12, 1916	100	11,675.00
Aug. 14, 1916	50	6,525.00	Dec. 14, 1916	100	10,600.00
Aug. 25, 1916	1,700	215,050.00	Jan. 2, 1917	5	470.00
Aug. 28, 1916	1,000	122,375.00	Feb. 15, 1917	10	790.00
Aug. 30, 1916	100	11,587.50	Mar. 1, 1917	5	377.50
Sept. 6, 1916	10	1,202.50	Mar. 5, 1017	200	15,500.00
Sept. 14, 1916	13,100	1,819,262.50	Apr. 4, 1917	20	1,490.00
Sept. 19, 1916	231	31,069.50	May 4, 1917	200	12,475.00
Oct. 16, 1916	120	16,200.00	May 31, 1917	50	3,031.25
Oct. 17, 1916	100	13,425.00	June 15, 1917	100	5,737.50
Oct. 28, 1916	8,600	1,102,950.00			

Opinion of the Court

The United Motors Corporation upon payment in of the aforementioned 81,555 shares of Perlman Corporation stock became obligated to and did issue its class A stock for such Perlman stock on the basis of two shares for each share of Perlman Rim Corporation stock paid in.

XII. During the fiscal year ended June 30, 1917, the United Motors Corporation owned directly, or controlled through closely affiliated interests, all, or substantially all, of the voting stock of the Hyatt Roller Bearing Company, Remy Electric Manufacturing Company, Perlman Rim Corporation, Dayton Engineering Laboratories Company, New Departure Manufacturing Company, Harrison Radiator Corporation, New Departure Realty Company, Jackson Rim Company, and United Motors Service, Inc., and, during such taxable year these corporations were affiliated for excess-profits tax purposes.

The court decided that plaintiffs were entitled to recover, judgment to await the filing of the computation of tax in accordance with the opinion.

LITTLETON, *Judge*, delivered the opinion of the court:

The issues involved in these cases are all essentially questions of fact.

As to the actual cash value of the stocks of the plaintiffs paid in to the United Motors Corporation for its stock, we have found the fact to be that the value of the stocks of the Hyatt Roller Bearing Company, the Remy Electric Manufacturing Company, and the Dayton Engineering Laboratories Company, and 13,000 shares of stock of the Perlman Rim Corporation, paid in was $60,947,900 at the time of such payment, and that the cash values of the additional shares of the Perlman stock paid in between June 6, 1916, and June 15, 1917, were as set forth in Finding XI. These values are clearly warranted and are fully established by the evidence. The capital stocks of the Hyatt Roller Bearing Company, the Remy Electric Manufacturing Company, and the Dayton Engineering Laboratories Company were at all times closely held, and there was no established market price for them. The stocks of the United Motors

Corporation and the Perlman Rim Corporation were extensively bought and sold upon recognized stock exchanges. The plaintiffs submitted voluminous proof relative to the various sales of United Motors and Perlman Rim stock and as to the values of the tangible and intangible assets of all of the plaintiffs at the time the stocks were paid in to United Motors Corporation, all of which fully justifies the cash values which we have found for all of the stocks paid in to United Motors Corporation for its stock for consolidated invested capital purposes.

The defendant contends for a cash value for the stocks of plaintiffs paid in to United Motors upon the basis of small numbers of shares changing hands between stockholders from time to time prior to and near the time of the acquisition of the stocks by United Motors. We have examined such sales in the light of all of the other facts established by the testimony, and values based upon such contention are clearly shown not to be a fair basis for arriving at the actual cash values of the stocks paid in. The findings dispose of this question, and no useful purpose would be served by a lengthy discussion of the various contentions advanced by the parties relative to the values contended for by them.

The fair market values on March 1, 1913, which we have found for patents are clearly established by evidence of the position which the owners of such patents occupied in the industry and by facts relative to earnings attributable to such patents and by opinion evidence of value by those fully qualified to testify relative to the values of such property.

The allowances for depreciation upon the basis of the March 1, 1913, values have been computed upon the basis of the life of the principal patents. When the allowance is computed upon patents issued subsequent to March 1, 1913, upon the basis of the fair market value of the applications made prior to that date, the allowance begins from the date of issuance of the patent and is computed upon the basis of the remaining life thereof. This is the recognized method for computing allowances for exhaustion of

patents in such cases. *Individual Towel & Cabinet Service Co.*, 5 B. T. A. 158; *Hartford-Fairmont Co.*, 12 B. T. A. 98; *A. E. Starbuck, Administrator*, 13 B. T. A. 796.

In the case of Perlman Rim Corporation patent #1052270 it appears that this patent, together with all rights to damages and profits for infringement of such patent prior to such acquisition, was acquired by the Perlman Rim Corporation on March 15, 1916, from Louis H. Perlman for 36,000 shares of stock and an annuity of $25,000 a year for the life of the patent. At the time of this acquisition the United States courts had found infringement and had granted an injunction and decree for accounting. *Perlman* v. *Standard Welding Co.*, 231 Fed. 453, affirmed 231 Fed. 734.

Subsequent to December, 1916, the Standard Welding Company, then known as the Standard Parts Company, issued its check to the Perlman Corporation for $1,010,000 in settlement of all claims for infringement. The facts establish and we have found that the fair market value of the stock of the Perlman Corporation issued in payment for this patent and rights to damages for infringement was $137.50 a share. Upon the basis of this value and the value of the annuity, the cost to the Perlman Corporation of said patent was $3,816,850. Upon this cost the allowance for exhaustion should be computed on the basis of the remaining life of the patent at the date acquired.

In this connection the defendant contends that the check received by the Perlman Corporation from the Standard Parts Company constituted taxable income and, inasmuch as the Perlman Corporation had not reported the same in its return, its income should be increased accordingly. There is no merit in this contention. The Perlman Corporation purchased the right to whatever damages might be recovered for infringement of the patent for stock and to that extent the matter was therefore a capital transaction. The subsequent receipt by the corporation of a check from the Standard Parts Company was nothing more than the conversion of this asset, and no taxable income was received.

With reference to the matter of allowances for exhaustion, wear and tear of the plants and equipment, the proof

does not satisfactorily show that the values and costs of such assets as determined by the Commissioner of Internal Revenue, upon which he computed his allowances, were incorrect. The facts do establish, however, that in almost every case the rates used by the defendant in computing the allowances made were too low. The defendant, while conceding that unusual conditions existed in the plants of the plaintiffs, held that the efforts of plaintiffs to keep their plants, machinery, and equipment in a high degree of efficiency had prevented any extraordinary depreciation within the taxable year. He, therefore, applied the normal rates in computing exhaustion of such property under usual and ordinary circumstances on the basis of a life of 50 years for buildings, 12½ years for machinery, and 10 years for laboratory equipment and office furniture. The defendant allowed as deductions the total amounts expended for dies, jigs, tools, patterns, and drawings during the taxable year. The facts show that the plants of the plaintiffs were in almost constant operation during the taxable year; that plaintiffs were compelled to employ to a large degree in the operation of their plants and equipment persons who were unskilled and incompetent properly to operate and care for the various classes of machinery and equipment, and that, although plaintiffs made every effort to maintain their properties in good condition and to keep their machinery and equipment in a proper state of efficiency, the circumstances and conditions were such that they were not able properly to do this so as to prevent unusual exhaustion, wear and tear. We have set forth in the findings the rates which should be applied in computing the allowances for exhaustion, wear and tear for the taxable year for the physical assets of the plaintiffs.

The claim of the defendant that plaintiffs may not recover because the tax in question was not paid under protest is not justified. These are suits against the United States. Section 252 of the revenue act of 1918, 40 Stat. 1057, 1085, is mandatory in its provision that any overpayment of tax shall be refunded or credited, and sections 1316 and 1318 of the revenue act of 1921, 42 Stat. 227, 314, authorize suits for refund if claims for refund are filed. Under these

sections and section 145 of the Judicial Code, the right of plaintiffs to maintain the suits and the authority of the court to render judgments for refunds can not be made to depend upon whether the tax was paid under protest. *United States* v. *Hvoslef*, 237 U. S. 1. *Greenport Basin & Construction Co.* v. *United States*, 269 Fed. 58. *Farmers Loan & Trust Co. et al.* v. *United States*, 64 C. Cls. 516. In these cases claims for refund were duly filed and suits were timely instituted. Plaintiffs are, therefore, entitled to judgments for refund of such amounts as may have been overpaid.

The records do not contain sufficient information with reference to noncontested matters relating to consolidated invested capital and consolidated income for income and excess-profits tax purposes to enable the court to make a computation of the tax and to determine the amounts for which plaintiffs are entitled to judgment. The parties will, therefore, make a computation of the income and profits tax liabilities of the plaintiffs and the other corporations with which they were affiliated during the taxable year and file a stipulation of the amounts to be included in the judgments to be entered in favor of the plaintiffs.

Entry of judgment in each case will therefore be withheld pending the filing of such stipulation or computation.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear and took no part in the decision of this case.

BASSICK MANUFACTURING CO. v. THE UNITED STATES

[No. J–179. Decided October 20, 1930]

On the Proofs

Excise taxes; tax on automobile parts or accessories; grease gun and nipples.—Grease gun and nipples, manufactured by plaintiff, put up in packages with sufficient nipples to replace the

grease cups on a Ford automobile chassis, and so sold by it, and as so put up and sold primarily adapted for use on automobiles, held to be taxable as automobile parts or accessories.

The Reporter's statement of the case:

Mr. George M. Wilmeth for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Arthur J. Iles* was on the brief.

The court made special findings of fact, as follows:

I. The Bassick Manufacturing Company, Inc., during the times hereinafter mentioned was and now is a corporation organized, existing, and operating under and by virtue of the laws of the State of Delaware with its principal place of business located at Chicago, Illinois.

II. During the times hereinafter mentioned plaintiff was engaged in the business of manufacturing and selling grease guns, connections for grease guns, and nipples.

The articles named constitute a system of high-pressure lubrication which involves what are known as grease nipples and a pressure compressor. The nipples are used to replace the old-style grease cups which are attached to the bearings. This system of lubrication is used in greasing many types of industrial machines and implements as well as automobiles.

The grease guns manufactured and sold by the plaintiff were of various sizes and sold at a wide range of prices, depending largely upon the size and cost of production, there being no material difference either in the construction or practical operation of the different sizes.

The taxes in question were assessed with reference to the manufacture and sale of packages of these articles, consisting of one grease gun, or compressor, and nineteen nipples, that being the number of nipples necessary to replace the grease cups on the chassis of a Ford automobile. The nipples were assorted with reference to their particular utility on Ford cars, being two of one kind, four of another, three of another, etc. These packages were sold by

the plaintiff as a unit with the statement on each package, "For Ford passenger cars, trucks, and tractors."

The articles in these packages as put up and sold by the plaintiff were primarily adapted for use on automobiles.

It is not shown in the record that any of these articles so assembled and sold in packages were used otherwise than on automobiles. The plaintiff paid no taxes on grease guns, grease-gun connections, and nipples manufactured and sold by it except those assembled in packages and sold as aforesaid for use on automobiles.

III. Plaintiff made and filed its manufacturers' excise tax returns monthly for the period September, 1924, to February, 1926, inclusive, showing the amount of tax due thereon which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by plaintiff for the months, in the amounts, and on the dates hereinafter set forth, as follows:

Period	Year	Month	Year	Page	Line	Amount	Date paid
Sept	1924	Oct	1924	55	3	$426.70	10/30/24
Oct		Dec		11	3	381.27	12/5/24
Nov		Dec		40	3	197.62	12/27/24
Dec		Jan	1925	58	9	164.38	1/31/25
Jan	1925	Mar		1	8	151.09	3/3/25
Feb		Mar		50	2	417.03	3/21/25
Mar		Apr		46	6	707.04	4/28/25
Apr		May		43	6	499.69	5/29/25
May		June		51	2	928.77	6/30/25
June		July		48	1	1,005.80	7/29/25
July		Sept		1	3	807.82	9/1/25
Aug		Oct		0	7	739.09	10/1/25
Sept		Oct		49	0	589.75	10/31/25
Oct		Dec		2	6	531.81	12/1/25
Nov		Dec		52	6	476.29	12/31/25
Dec		Jan	1926	39	9	1,031.15	1/29/26
Jan	1926	Mar		5	6	273.23	3/2/26
Feb		Apr		0	3	571.05	4/1/26

IV. On March 14, 1928, plaintiff filed its claim for refund No. 15832 of manufacturers' excise tax so paid on grease guns, connections for grease guns and nipples, for the period September, 1924, to February, 1926, inclusive, in the amount of $2,529.65, which was duly rejected by the Commissioner of Internal Revenue on March 30, 1928.

The court decided that plaintiff was not entitled to recover.

Opinion of the Court

WILLIAMS, *Judge*, delivered the opinion of the court:

The issue in this case is whether lubricating outfits described in Finding III, consisting of a grease gun and nineteen nipples, assembled in packages, and advertised and sold "For use on Ford passenger cars, trucks, and tractors," are subject to the excise tax provided in section 600, of the revenue act of 1924 (43 Stat. 253, 322) as parts or accessories for automobiles.

Plaintiff contends that since grease guns, grease-gun connections, and nipples are adaptable for use on other than automobiles, and when sold separately are not subject to tax, the grouping together of a grease gun and a sufficient number of nipples to replace the grease cups on the chassis of Ford automobiles, and the advertisement and sale of the articles so grouped, for use on Ford automobiles, does not make such sales taxable within the meaning of the statute.

This contention has been decided adversely to the plaintiff in *Fairmount Tool & Forging Company* v. *United States* (decided by this court June 16, 1930 [*ante*, p. 425]). The court said:

"Tools of general utility—i. e., capable of use for a variety of purposes—may not escape classification as an automobile accessory upon this single fact. This, we think, is apparent. Ordinary monkey wrenches, pliers, hammers, etc., may serve a variety of useful purposes; but when set aside and singled out for an especial purpose, the very necessity of so doing emphasizes the correctness of classifying them as accessories to the purpose. The plaintiff, in order to appeal to a special demand, an essential demand, segregates from his large stock of merchandise the particular units which serve the custonmers' especial necessities and gives to the public the merits of his offering by assuring him in public advertisements that the 'kits' meet all the especial emergencies that may be remedied by the use of the tools purchased. It is only when this is done that the commissioner taxes the articles. The fact that tools of this design, functioning as these tools do, were manufactured prior to the advent of the automobile, and are not now, nor never were, especially designed for use on an automobile, is not in and of itself determinative. See *Cole Storage Battery Co.* v. *United States*, 65 C. Cls. 164; *Walker Mfg. Co.* v. *United States*, 65 C. Cls. 394; *Advance Automobile Accessories Corporation* v. *United States*, 66 C. Cls. 304."

The plaintiff in the instant case selected from the large variety of grease guns manufactured by it a gun adaptable in size for satisfactory use in the lubrication of Ford automobiles, put it into a package with nineteen nipples of suitable design for replacement of the grease cups on a Ford chassis, advertised, and offered such package for sale to Ford owners for use on their cars.

Under the rule announced in the cases cited, the articles, grouped into packages and sold by the plaintiff in the manner stated, are primarily adapted for use on automobiles, and the Commissioner of Internal Revenue properly assessed and collected taxes on such sales. See *Universal Battery Company* v. *United States*, decided by the Supreme Court May 26, 1930. [281 U. S. 580.]

The plaintiff's petition must be dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear and took no part in the decision of the case.

INTERNATIONAL ARMS & FUZE CO. v. THE UNITED STATES

[No. C–221. Decided October 20, 1930]

On the Proofs

Contracts; munitions of war; counterclaim; accounting for material.—Counterclaim dismissed on issue of fact as to receipt, use, and accounting by the plaintiff for Government material in connection with settlement of various contracts for munitions of war. Recovery on plaintiff's cause of action conceded.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff. *King & King* were on the briefs.

Mr. R. R. Farr, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Dan M. Jackson* and *Madam L. M. Coyne* were on the brief.

The court made special findings of fact, as follows:

I. The plaintiff is now, and was during all of the times hereinafter mentioned, a Maine corporation with its principal place of business formerly located in the city of Bloomfield, State of New Jersey. Its principal office was, and is now, at New York.

II. Prior to the entry of the United States into the World War the plaintiff was engaged in making munitions, mainly fuzes and adapters, for the British Government. Subsequent to the time that the United States became a party to the war, in April, 1917, plaintiff greatly enlarged its existing plant at Bloomfield, New Jersey, and thereafter entered into numerous contracts with the United States for the manufacture of munitions. Among the contracts entered into were contracts Nos. GA–110, G–919–501–A, P–9631–2617–A, P–16481–3947–A, P–11969–29730–A, P–12921–3210–A, G–1715–948–A, P–12832–3184–A, P–13004–3228 – A, P–14676–3831–A, P–8568–1957–TW, P–9575–2608–A, P–10687–2767–A, G–1048–559–A, P–19219–4797–A, P–18775–4676–A, and MA–20785.

Among the kinds of munitions made by plaintiff for the United States were 21-second time fuzes, the body of which was made from bronze body forgings, and the other parts of which were made from brass rod of various sizes. The 21-second combination time and percussion fuze is a conical pointed structure designed to be screwed into the nose of a shrapnel shell and so constructed as to burst the shrapnel either at the end of a predetermined time from the exit of the projectile from the gun or upon impact with the ground or other obstruction. The fuze contains two separate mechanisms or elements; one, the time element by means of which the fuze may be set to burst at any time from zero to 21 seconds from the time of exit from the gun, the other a percussion element which consists of a plunger armed by rotation of the projectile and a primer against which the plunger may strike upon impact and a separate flame channel from the primer to the magazine charge of the fuze so designed as to ignite the base charge of the shrapnel and cause the bursting of the same.

III. The first contract entered into by and between the plaintiff and the United States for fuzes was known and designated as GA–110, and was for 1,000,000 21-second time fuzes. It was originally on a cost-plus basis, but before completion was, at contractor's request, changed to a fixed-price contract of $2.47 per fuze, the contractor supplying all necessary labor and materials. On completion of this work the contractor had on hand unused, and later used in subsequent contracts, a large surplus stock of brass rod, sheet brass, and forgings of the kinds required in making 21-second time fuzes. The exact amount of surplus stock of brass rod, sheet brass, and forgings that plaintiff had on hand at the completion of the contract does not appear from the evidence in the record. This contract is not in litigation in this action and is not in issue in this case except as showing an accumulation of material on hand at the time of the completion of the same.

IV. December 1, 1917, plaintiff entered into a second contract with the United States, represented by Samuel McRoberts, colonel, Ordnance Department, National Army, acting by and under the authority of the Chief of Ordnance, United States Army, and under the direction of the Secretary of War, which contract was designated G–919–501–A. By the terms of this contract plaintiff corporation obligated itself to make and deliver to the United States 1,000,000 combination 21-second fuzes, Model 1907, at and for the price of $2.397017 per fuze, with the provision, however, that the United States might from time to time furnish the contractor with component parts, material, supplies, and the like for use in the performance of the contract, providing that the contractor's undertakings therefor previously made in good faith should not be interfered with, and that such component parts, material, supplies, and the like furnished by the United States should be paid for by the contractor, if used, at the prices set forth in the schedule of materials and component parts contained therein, and the price to be paid by the United States to the contractor for the articles should be reduced by an amount equal to the total of such prices of component parts, materials, supplies, and the like furnished by the United States.

By amendment No. 1 dated February 19, 1918, which amendment was later reduced to the form of a supplemental agreement, plaintiff assumed certain contracts between the United States and the American Brass Company and the United States and the Chase Rolling Mills Company, covering the sale of scrap accruing during the execution of the contract, and obligated itself to hold the United States free from loss due to its failure to fulfill all conditions thereto, upon the condition that the scrap or the revenue from the sale of the scrap was to become the property of plaintiff, but plaintiff was to dispose of it as agreed by the United States in its original contracts with the Chase Rolling Mills Company and the American Brass Company.

A copy of contract G-919-501-A is attached to plaintiff's original petition as Exhibit A, and is made a part hereof by reference. A copy of the first amendment thereto is attached to plaintiff's original petition, marked "Exhibit A-1," and is made a part hereof by reference. Copies of the contracts entered into by and between the United States and the American Brass Company and the Chase Rolling Mills Company are attached to plaintiff's original petition as Exhibit B and Exhibit C, respectively, and are also made a part hereof by reference.

V. June 10, 1918, plaintiff entered into a third contract, No. P-9631-2617-A, with the United States, represented by J. H. Watkins, lieutenant colonel, Ordnance Department, United States Army, acting by direction of the Chief of Ordnance, United States Army, and under the authority of the Secretary of War, by the terms of which contractor obligated itself to furnish and deliver to the United States 500,000 21-second combination fuzes, 1907-M complete, at and for the price of $2.3555 per fuze.

Article IV of said contract provided as follows:

"*Component parts to be furnished by United States.*—The United States shall furnish without cost to the contractor the materials and component parts listed on Schedule 2, in quantities determined by the Chief of Ordnance to be requisite for the performance of this contract. Should the contractor be delayed in making deliveries of the articles by reason of delays in the furnishing of such ma-

terials or component parts by the United States, a corresponding extension of time shall be allowed the contractor.

"In addition to the raw materials and component parts listed on Schedule 2, the United States may from time to time, at its option, furnish to the contractor other materials and component parts for use in the performance of this contract: *Provided, however*, That the contractor has not previously and in good faith contracted for the purchase of such materials or component parts. Unless it is provided in writing that materials and component parts (other than those listed on Schedule 2) are furnished by the United States without charge, the United States shall be credited with the value thereof, f. o. b. contractor's plant, fixed at the estimated cost of such materials or component parts used in determining the contract price of the articles, the contractor to pay demurrage, storage, cartage, and switching charges. Payments for the articles shall be reduced accordingly.

"All materials and component parts furnished by the United States shall comply with specifications and shall remain the property of the United States. The contractor shall account for all materials and component parts furnished by the United States, the cost of which has not been paid by or deducted from payments made to the contractor, in finished product, scrap, unused material, or otherwise, and shall make such disposition thereof as may be ordered in writing by the Chief of Ordnance. Upon final delivery of the articles, and prior to final payment thereof, the contractor shall deliver to the Chief of Ordnance a sworn statement in form satisfactory to him of the quantity of such unused material or component parts remaining in the contractor's possession."

A copy of this contract is filed with plaintiff's original petition, marked "Exhibit D," and is made a part hereof by reference.

VI. October 15, 1918, plaintiff and the United States entered into a fourth contract for 21-second fuzes, known as P-16481-3947-A, for 2,000,000 fuzes at a fixed price of $1.82 per fuze, the Government to supply free of all cost to the contractor 1.7 pounds of brass in the form of brass rod and strip per fuze and the necessary body forgings. A copy of this contract is filed with plaintiff's original petition, marked "Exhibit E," and is made a part hereof by reference.

Reporter's Statement of the Case

VII. The contracts set out in Findings III, IV, and V were completed and the fuzes delivered. The fourth contract, the same being the one set out in Finding VI, was in the course of production at the time of the armistice and was suspended by the Government when about 151,086 fuzes had been delivered. This contract was suspended in December, 1918, and a settlement agreement was entered into between the plaintiff and the Government, and an award made plaintiff, which award was paid. Plaintiff was paid for a total of 141,654 fuzes at the contract price. The difference between the total delivered and the quantity paid for is not accounted for in the record. At the time of suspension contractor had on hand in various stages of completion parts for a great many additional fuzes, and had made large expenditures in working or partly working most of the materials required for completing the contract.

VIII. The Government furnished the American Brass Company 1,398,284 pounds of raw copper at a cost of $328,596.74. In addition to this amount the Government paid transportation charges on this copper to the plant of the American Brass Company in the sum of $1,761.84. There was also furnished to the American Brass Company by the Government 932,189 pounds of spelter, which cost the Government the sum of $80,278.37 plus freight charges for the transportation of the same, amounting to $1,299.02.

The Government paid the American Brass Company a conversion charge of $105,770.73. The total cost of the raw spelter and copper shipped to the American Brass Company, including the conversion charge, was $514,645.84. The total cost of the raw spelter and copper, including the conversion charge and the freight on the same, to the plant of the American Brass Company was $517,706.70.

The Government furnished the Chase Rolling Mills Company 423,981 pounds of raw copper, for which the Government paid 23½¢ per pound, or a total of $99,635.54. The Government also furnished the Chase Rolling Mills Company 276,814 pounds of raw spelter, for which it paid the total sum of $20,954.82. The Government paid a conversion charge to the Chase Rolling Mills Company amounting to $53,119.30. The Government also paid freight on the spel-

ter and copper that it furnished the Chase Rolling Mills Company in the sum of $1,934.69.

The total cost to the Government of raw copper and spelter that it shipped to the Chase Rolling Mills Company, including the conversion charge, exclusive of freight, was $173,709.66.

IX. The Chase Rolling Mills Company delivered to the Army inspector of ordnance at its plant, and he consigned to the Army inspector of ordnance at the plant of the International Arms & Fuze Company a total of 1,060,200 fuze body forgings for use by plaintiff in the performance of its contract G–919–501–A.

The Army inspector of ordnance at the plant of the American Brass Company consigned to the Army inspector of ordnance at plaintiff's plant a total of 2,247,055 pounds of brass rod and 83,418 pounds of sheet brass for use by plaintiff in the performance of contract G–919–501–A.

X. The United States contracted with the Chase Rolling Mills and the American Brass Company for a supply of body forgings and brass rod and sheet and furnished the Chase Rolling Mills with 423,981 pounds of copper at a cost of 23½¢ per pound, or $99,635.54. The United States likewise furnished the Chase Rolling Mills with 276,814 pounds of spelter at a cost of 7.5¢ per pound, or $20,954.82.

Likewise the Government of the United States supplied the American Brass Company with 634,851 pounds of copper at 23½¢ per pound, or $149,189.99, and with 405,919 pounds of spelter, part of which cost 7.74¢ per pound and the remainder 13¢ per pound, at a calculated total cost of $31,418.31.

The Chase Rolling Mills made and delivered to the Army inspector of ordnance at its plant a total of 531,193 body forgings and was paid therefor by the United States at the rate of 10¢ per forging, $53,119.30.

The American Brass Company made and delivered to the Army inspector of ordnance at its plant a total of 1,040,770 pounds of brass rod and sheet brass and was paid therefor by the United States the total sum of $56,039.27. The Army inspector of ordnance at the plants of the Chase Rolling

Mills Company and the American Brass Company consigned on Government bills of lading to the Army inspector of ordnance at plaintiff's plant the quantities of forgings and brass rod and sheet so made and delivered, for use as and if required by plaintiff in the performance of contract P-9631-2617-A, described in Finding V hereof.

XI. The Army inspector of ordnance at the Chase Rolling Mills and American Brass Company's plants consigned on Government bills of lading to the Army inspector of ordnance at plaintiff's plant, for use as required in the performance of contract P-16481-3947-A, 2,433,921 pounds of brass rod and sheet brass of various sizes and 483,396 brass body forgings. The cost of this to the United States does not appear from the evidence in the record.

XII. The Army inspector of ordnance at plaintiff's plant at Bloomfield, New Jersey, was also Army inspector of ordnance at other plants. His main or principal office was at Bloomfield, New Jersey, but he made frequent trips to the other plants where he was acting as the Army inspector of ordnance. It frequently happened that when cars of material were consigned on Government bills of lading to the Army inspector of ordnance at the plant of the International Arms & Fuze Company some of the cars were diverted and sent to other plants. This occurred, however, only when other plants were in need of material and when plaintiff's plant had a reasonable supply on hand. It does not appear from the evidence in the record how many cars that were consigned on Government bills of lading to the Army inspector of ordnance at plaintiff's plant were later diverted and sent to other plants.

All cars of material consigned on Government bills of lading to the Army inspector of ordnance at plaintiff's plant were sealed before shipment and the seals were broken and cars opened at destination only by the Army inspector of ordnance or his duly authorized representative. On the opening of the cars the materials were checked as to sizes and weights and were taken from the unloading platform to Government storeroom in the basement of one or more of the plant buildings and were there stored under lock and

key under the exclusive control of the Army inspector of ordnance, and the materials were thereafter issued by the Army inspector of ordnance, or his representative, to the contractor for use only on written request by it for materials as required. Before July 1, 1918, the Army inspector of ordnance receipted for all materials so received by him on the official transfer of property record known as Form AGO-600. Subsequent to July 1, 1918, the contractor was also required to stamp or sign a notation on the Form AGO-600 evidencing the transfer of Government property from the consignor to the Army inspector of ordnance at plaintiff's plant, but neither before nor after July 1, 1918, were such materials turned over to, or received by, the contractor except as actually required for use on the work, and upon written requisition by the contractor on the inspector of ordnance for specific quantities. It does not appear from the evidence in the record in this case what quantities of material were actually issued to the contractor for use, and used by it, in the making of the 21-second time fuzes under any of the contracts hereinbefore mentioned and described. Nor is there proof that plaintiff failed to pay, or otherwise account, to the defendant for all material actually received by plaintiff. At the time of the commencement of work on the first contract plaintiff had on hand a stock of brass and other materials suitable for use in the manufacture of 21-second fuzes left over from similar contracts with the British Government that cost a total of $572,366.79. Such materials were used by plaintiff in the performance of its contracts with the United States.

During the progress of the work under the first fuze contract with the United States plaintiff purchased 2,311,618½ pounds of brass rod at a cost of $636,706.52, and a total of 1,069,421 body forgings. It does not appear from the evidence in the record what these body forgings cost. The materials so purchased were more than sufficient to make all the fuzes that were made under the first contract. Upon the completion of operations under the first contract contractor had on hand the aggregate of the surplus material left over from the British contracts and a considerable surplus from the first contract with the United States. It does

not appear from the evidence, however, what amount of surplus was then on hand and belonging to the contractor.

Likewise at the end of the operations under the last contract the United States had on hand a large stock of unused fuze materials, accounted for by the contractor using its own materials in lieu of corresponding quantities of Government materials. It does not appear from the evidence in the record how much material the Government had on hand at the completion of plaintiff's contracts, neither does it appear from the evidence what disposition was made of the surplus.

XIII. Before July 1, 1918, the Army inspector of ordnance on duty at plaintiff's plant was charged with accountability and responsibility for all Government-owned materials shipped to the plant. Subsequent to July 1, 1918, the property manager for the New York district was the accountable officer for all such materials, the Army inspector of ordnance at the plant being his agent for the handling of any accounting for such materials.

From the beginning of operations until March 2, 1918, Lieut. A. W. Dorchester was the Army inspector of ordnance at plaintiff's plant who received all Government materials shipped to the plant during such period and disposed of or expended such materials as were disposed of or expended. On March 2, 1918, Lieut. Dorchester turned over to his successor, Lieut. Charles A. Finley, and Lieut. Finley receipted for, a total of no pounds of brass rod and 717,530 forgings theretofore received by Lieut. Dorchester for use as required on contract G–919–501–A. The materials that were turned over and receipted for by Lieut. Finley were all that had been theretofore received by Lieut. Dorchester without expenditure or other disposition of any kind. In addition to the fuze materials received from Lieut. Dorchester, Lieut. Finley, Army inspector of ordnance, during the period ending June 30, 1918, received a total of 2,952,624 pounds of rod and sheet brass and 535,394 forgings. On June 30, 1918, Lieut. Finley turned over to the property manager for the New York district, and the property manager receipted for, a total of 2,952,624 pounds of rod and sheet brass and 1,252,924 forgings, which was all that Lieut.

Finley had received. Contract G–919–501–A was completed during this period and work on P–9631–2617–A commenced.

Lieut. Finley remained as Army inspector of ordnance at plaintiff's plant until some time in September, 1919. As of December 31, 1918, a "property return" was made signed by the property manager for the New York district and by Lieut. Finley as Army inspector of ordnance, taking a debit for 1,252,924 body forgings and 2,952,624 pounds of brass rod, and for 788,275 forgings and 3,801,693 pounds of rod afterwards received at plaintiff's plant, and crediting himself for expenditures or issues of 1,634,221 forgings and 3,445,572 pounds of brass rod. The basis for the "expenditures" shown in the return does not appear from the evidence in the record. Vouchers Nos. 1793 and 1796 supporting the return take credit for an expenditure of 1,614,222 forgings and 6,209,537 pounds of 21-second fuze materials, including 3,475,405 pounds of 1.25 brass rod which was not a fuze component, as expended in the manufacture of 21-second combination fuzes, model 1907–M on contracts GA–110 for 1,000,000 fuzes; G–919–501–A, for 1,000,000 fuzes; P–9631–2617–A for 519,587 fuzes; and P–16481–3947–A for 19,999 fuzes. Plaintiff furnished all the materials required and used in the performance of contract GA–110 for 1,000,000 fuzes, and there were no expenditures of Government materials under that contract. The actual issue or expenditure of materials from Government stores, under the other contracts, is not shown by the so-called "property return," and does not appear from the evidence in the record.

The "property return" for December 31, 1918, showed on hand unexpended 3,298,745 pounds of brass rod and 406,978 forgings. All work was suspended before this date and there was no occasion for "issue" to the contractor thereafter.

Work on the third contract was completed in October, 1918, and work on the fourth contract was suspended in advance of completion, in December, 1918. Contractor relied upon the Government officials to keep record showing the quantity of Government materials, if any, turned over for

use under the several Government contracts. Plaintiff kept no record of the same.

XIV. August 19, 1918, after the work under the second contract G–919–501–A was completed, plaintiff wrote the finance division of the Ordnance Department, New York City, as follows:

FINANCE DIVISION,
Ordnance Department, Albemarle Building,
24th St. & Broadway, New York City.

GENTLEMEN: Now that our second contract, War-Ord. G–919–501–A for 1,000,000 21-second combination fuzes is almost completed, we would like to receive as early as possible a debit for the material supplied as under this contract. We hope you will arrange to let us have this at once as we are very desirous of having our accounts in connection with this contract closed.

We understand the contracts the Government originally held with the Chase Rolling Mills and American Brass Company had been assigned to us and that we would be debited by these two companies for the material shipped us. We had this matter up repeatedly but have learned only recently that these two mills had been paid direct by the Government for the material.

Yours very truly,
INTERNATIONAL ARMS & FUZE CO., INC.,
Comptroller.

On August 26, 1918, plaintiff received the following reply to its letter dated August 19th.

INTERNATIONAL ARMS & FUZE COMPANY,
Bloomfield, N. J.

GENTLEMEN: Under supplemental agreement in connection with contract G–919–501–A, it is provided that the International Arms & Fuze Company shall assume all obligations of the United States under contract G–1035–550–A with the Chase Rolling Mill Company and under contract G–941–511–A with the American Brass Company. The records of the disbursing officer, Bridgeport, Connecticut, show that the following payments have been made by the United States under the contracts mentioned:

Reporter's Statement of the Case

Contract G–1035–550–A, Chase Rolling Mills Company

Delivery date	Quantity delivered	Amount
Nov. 23, 1917, and Nov. 30, 1917	118,960 forgings	$39,690.23
Dec. 1, 1917	191,349 forgings	64,383.57
Dec. 12, 1917	83,277 forgings	28,013.30
Dec. 15, 1917	57,099 forgings	19,212.21
Dec. 17, 1917	85,654 forgings	28,820.17
Dec. 26, 1917	84,595 forgings	28,463.84
Dec. 29, 1917	103,910 forgings	34,962.80
Jan. 5, 1918	175,946 forgings	59,200.91
Jan. 7, 1918	35,160 forgings	11,832.37
Jan. 16, 1918	61,330 forgings	20,635.83
Jan. 21, 1918	28,168 forgings	9,000.62
Jan. 30, 1918	37,206 forgings	12,511.71
Total		356,727.56

Contract G–941–511–A, American Brass Company

Delivery date	Quantity delivered	Amount
Nov. 19, 1917	781,574 lbs. brass rod	$34,193.87
Dec. 4, 1917	458,794 lbs. brass rod	15,427.26
Dec. 4, 1917	59,084 lbs. brass rod	2,699.78
Dec. 4, 1917	9,279 lbs. brass rod	960.77
Dec. 7, 1917	175,548 lbs. brass rod	8,137.50
Jan. 16, 1918	155,375 lbs. brass rod	6,797.66
Jan. 26, 1918	216,426 lbs. brass rod	9,468.65
Feb. 1, 1918	281,089 lbs. brass rod	12,829.31
Feb. 8, 1918	62,185 lbs. brass rod	2,720.60
Feb. 13, 1918	36,031 lbs. brass rod	1,576.36
Feb. 28, 1918	22,940 lbs. brass rod	1,003.63
Total		95,815.39

SUMMARY

Payments to Chase Rolling Mill Company	$356,727.56
Payments to American Brass Company	95,815.39
Total	452,542.95

Instructions have been received from the procurement division to the effect that further payments to the International Arms & Fuze Company should be withheld until the United States is reimbursed for the aggregate of the payments to the Chase Rolling Mill Company and the American Brass Company.

In order that it will not become necessary to withhold these payments it is suggested that you forward to this office your check to the order of the Treasurer of the United States in the amount of $452,542.95, the total of the payments made to date to the contractors referred to above.

THOMAS DENNY,
Major, Ord. Dept., U. S. A., Financial Manager.
By P. A. GALLEHER,
Captain, Ord. Dept., U. S. A., Disbursing Officer.

Reporter's Statement of the Case

Treating the bills thus rendered as on account and without any check as to their accuracy, the plaintiff promptly paid to the United States the full amount demanded, $452,542.95.

September 4, 1918, the Ordnance Department wrote plaintiff and demanded a further payment of $21,189.53, which letter is as follows:

INTERNATIONAL ARMS & FUZE CO.,
Bloomfield, N. J.

GENTLEMEN: Reference is made to our letter of the twenty-sixth ultimo relative to contract G-919-501-A.

In said letter you were requested to forward your check to the order of the Treasurer of the United States in the amount of $452,542.95, representing the total of payments to date to the Chase Rolling Mill Company under contract P-1035-550-A and to the American Brass Company under contract G-941-511-A.

Voucher in the amount of $120,832.54 is now submitted under which payment is claimed for the amounts withheld by the United States pending the completion of contract G-919-501-A. From this voucher it will be necessary to retain the sum of $21,189.53, representing the amounts remaining to be paid under the following contracts assumed by the International Arms & Fuze Company:

American Brass Company:	
G-941-511-A	$9, 554. 33
Chase Rolling Mill Co.:	
P-1035-550-A	11, 635. 20
	21, 189. 53

The balance of the voucher referred to will be paid upon receiving your check in the amount of $452,542.95 as requested in our previous letter upon this subject.

THOMAS DENNY,
Major Ord. Dept., U. S. A., Financial Manager.
By P. A. GALLEHER,
Capt. Ord. Dept., U. S. A., Disbursing Officer.

The sum of $21,189.53 demanded in the letter dated September 4, 1918, was deducted by the Government from monies due the plaintiff for completed fuzes. No other bills were rendered or demands made against plaintiff company until about a year after the suspension of hostilities, and after all contracts were suspended and settlements made, when the New York contract audit section asserted a charge against plaintiff company in the sum of $319,739.43 based

Reporter's Statement of the Case

upon freight on raw materials, the price of raw materials, namely, copper and spelter, the conversion cost of converting copper and spelter into brass rod or into forgings, etc. This was a purely theoretical charge based upon cost and conversion charges of raw material. No credit was given for any materials returned by the contractor to the United States at the conclusion of the fuze contracts. There was a credit of $84,956.68 for scrap brass returned by the International Arms & Fuze Company to the Chase Rolling Mills Company.

XV. It required from 2.87 to 3.67 of metal in the form of brass rod, sheet, and forgings to make one complete fuze weighing 1.25 pounds, the difference being scrap. Plaintiff returned to the Chase Rolling Mills Company 639,734 pounds of scrap, and the United States received from the Chase Rolling Mills Company $84,956.68, which amount was based on a price of 13 plus cents per pound. The current market value of scrap at or about that time was practically 17¢ per pound.

Plaintiff company returned to the American Brass Company 705,413 pounds of scrap, for which the American Brass Company paid plaintiff the sum of $97,043.08. Whether such scrap pertained to contracts in suit or to other contracts not herein involved is not shown by the evidence in the record. The amount of copper and spelter the Government furnished the American Brass Company was not reduced by this amount of scrap.

XVI. Of the body forgings made by the Chase Rolling Mills Company and shipped to the Army inspector of ordnance at plaintiff's plant for use under contract G–919–501–A, about 20,000 defective forgings were returned to the Chase Rolling Mills Company. The Chase Rolling Mills Company charged plaintiff at the rate of 33¢ per forging for replacement forgings, taking the place of the 20,000 that were defective. These forgings were included in the total of those delivered to the Army inspector of ordnance at the Chase plant and were paid for by the United States and included in its bill to plaintiff as rendered under date of September 4, 1918, and set forth in Finding XIV hereof.

The United States used in firing and other tests 66,000 completed fuzes. The metals used in the making of these 66,000 completed fuzes were not replaced by the United States but plaintiff was required to purchase or use from its own materials 40,225 additional forgings and corresponding quantities of brass rod and sheet to replace the material so expended.

In the testing of fuzes the only test that destroyed or used the brass contents of the fuze was the ballistic test. In all other tests the brass was not destroyed but could be used for scrap.

XVII. Incidental to the work under the third fuze contract P-9631-2617-A, plaintiff purchased 5,000 forgings to replace defective forgings. The United States used in tests about 3,000 fuzes. No replacement of defective forgings or of the materials expended in making the test fuzes was made.

Under the fourth fuze contract plaintiff returned 1,308 defective forgings furnished by the United States, and the United States used about 2% of the fuzes that were made for test purposes. No replacement of the defective forgings or of materials used in the fuzes for tests was made by the United States.

Under contract P-16481-3947-A contractor furnished all that was required of nine different sizes of brass rod, and no credit was given plaintiff for the same in the bill asserted by the New York audit section as set out in Finding XIV hereof. It does not appear from the evidence in the record how many pounds of brass rod were furnished by plaintiff.

XVIII. The Government shipped brass and other materials to plaintiff for use in the performance of plaintiff's other contracts, which contracts have been settled and are not at issue in this case.

XIX. During the course of the performance of the contracts plaintiff carried on its books a tentative account payable to the United States Government for material furnished, in the sum of $657,870.49. This account, however, did not represent material that had been received by the plaintiff company, but it represented material that had been consigned to the Army inspector of ordnance at plaintiff's

plant. As soon as plaintiff was informed that material for use in the performance of its contracts had been consigned to the Army inspector of ordnance it made a check of the cars in transit and frequently sent men to look after the cars in transit. The account carried on plaintiff's books was made up while the cars of material were in transit, and represented the cost of materials that would be due when the material was delivered to plaintiff.

The records of the Army inspector of ordnance show the issue or delivery to the plaintiff of no fuze materials current with the period when the entries were made in plaintiff's books of a tentative bills payable account as for such materials.

XX. Subsequent to the time of the armistice, and when the contracts were suspended, plaintiff had in course of performance various contracts with the United States for machining shell bodies, making rifle grenades, adapters, etc. Work under all such contracts was suspended and the Government officers made inventories of all materials, components, and commitments furnished or made by the contractor for the performance of such contracts. All such materials were taken possession of by the Army inspector of ordnance and placed in Government bond or storerooms to be disposed of by the Government.

XXI. With the inventories mentioned in Finding XX as a basis settlements were negotiated by the New York District Ordnance Claims Board, acting for the Secretary of War, under each of the suspended contracts, and the United States took title to the specified lots of material in raw or partly worked state, and to equipment of various kinds belonging to the contractor, listing all of such materials and equipment on what was known as Schedule A of the settlement agreement or award. Afterwards the Government sold at auction or otherwise disposed of all such materials and equipment as well as considerable quantities of raw materials from the Government stores. Some of it was shipped to Government arsenals, some of it was sold on the premises by an auctioneer attached to or appointed by the New York District ordnance office, and some of it was made up in miscellaneous quantities and sold as scrap to the highest bid-

der by a Government auctioneer appointed by the New York district ordnance office. When any of this material was removed from storage the Army inspector of ordnance was given by the district ordnance officer a shipping order, which shipping order furnished a description of the materials to be shipped, and a shipping ticket was made evidencing the shipment. A representative of plaintiff was present during all the times that the material was being inventoried and shipped. Upon the completion of the shipment of Government materials it was found that there were discrepancies between the materials acquired from the contractor on Schedule A and the materials shipped out on shipping tickets. In some few instances Schedule A showed more material than the shipping tickets showed was shipped out, but in the great majority of instances the shipping tickets showed that more material was shipped out or disposed of than was acquired and listed on Schedule A. It does not appear from the evidence in the record just how much this overage was.

XXII. The Government employees spent considerable time in an attempt to harmonize the materials listed on Schedule A with the materials listed on the shipping tickets. Many figures were changed in order to make them accord with other records. On December 17, 1920, plaintiff was notified by the contract audit section that it still owed the United States for fuze material shipped to the Army inspector of ordnance at its plant in connection with the second and third fuze contracts. The amount of this charge made by the Government does not appear from the evidence in the record, but later the whole transaction was certified to the Comptroller General of the United States where a charge was raised against the plaintiff in the sum of $766,563.90. This amount, however, was based upon the incorrect assumption that all materials shipped to the Army inspector of ordnance at plaintiff's plant were, by the Army inspector of ordnance, delivered to plaintiff for use under its contracts, and made no allowance for such material as was diverted and sent to other plants or for unused materials in general. Likewise it did not take into consideration material that was left over from plaintiff's British

Opinion of the Court

contracts, and which it had on hand at the beginning of its contracts with the United States, or for materials bought by the contractor and used to the exclusion of Government materials, or the overage represented by the shipping tickets in excess of the inventory at the time the Government took possession of the property and disposed of the same.

XXIII. By contract dated August 2, 1918, known as War Order P–12921–3210–A, plaintiff obligated itself to manufacture and deliver to the United States a total of 2,500,000 of what was known as Mark III fuzes at and for the price of 53¢ for each fuze. A copy of this contract is filed with plaintiff's original petition, marked "Exhibit I," and is made a part hereof by reference. As an incident to this contract plaintiff was made a loan, or an advance payment, of $380,000 to be repaid by deductions from the contract price of completed articles made and delivered under contract P–12921–3210–A, this agreement being evidenced by a formal supplemental agreement dated October 19, 1918, a copy of which is filed with plaintiff's original petition, marked "Exhibit J," and which is made a part hereof by reference.

Following the armistice work under the Mark III contract was suspended.

By the terms of this settlement agreement, a copy of which is attached to plaintiff's petition herein as Exhibit K and is by reference made a part hereof, the Government agreed to pay to the contractor in full settlement of contract P–12921–3210–A, the sum of $6,981.16. No part of this award has been paid to plaintiff.

The court decided that plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

We are of opinion from the facts that there is no merit in defendant's counterclaim and that plaintiff is therefore entitled to judgment for $6,981.16. This conclusion is not premised entirely upon defendant's failure to sustain its counterclaim by sufficient proof but is supported by facts which clearly refute the counterclaim made.

The issue is one of fact and is whether the plaintiff received and used, or otherwise failed to account for, the quantity of fabricated material constituting the difference between the total amount received by defendant's ordnance officer at plaintiff's factory and the amount on hand and in his possession upon termination of all operations, or otherwise accounted for by him.

Defendant's counterclaim is based upon the assertion that the plaintiff did receive and use, or failed to account for, the quantity in question.

It may be admitted that the total quantity of fabricated material in question was shipped to the ordnance officer at the plaintiff's factory and that this total quantity was transported in sealed cars from an ordnance officer at the factory of the fabricating concerns to the ordnance officer on duty at the plaintiff's factory. It was received by the latter, was checked with the documents describing the consignment, and was subsequently held under the latter's custody and assured control until such time as he from time to time either issued portions of it to the plaintiff for use in the manufacture of fuses, or transported portions elsewhere upon orders received by him from his superior officer. When materials were issued to the plaintiff it was the established practice and procedure, which was followed, to require the presentation of a requisition for a designated quantity, and in no other circumstances could the fabricated material be secured; nor was it ever otherwise issued. The stamp or notation by an officer or employee of the plaintiff upon the form AGO-600 was not a receipt by plaintiff of the material but was only for the purpose of putting plaintiff upon notice that the materials were on hand in the possession of the defendant's ordnance officer and available for issuance to plaintiff upon specific requisition. During the interval between the receipt and the issuance to plaintiff upon specific requisition, or transmittal to other factories, the fabricated material was stored in locked storerooms especially provided for that purpose. Admission to such storerooms was entirely under the control of defendant's ordnance officer.

The practice of accounting of the defendant's ordnance officer at plaintiff's plant was as follows: Upon arrival of

the cars containing a consignment the seals of the cars were broken by the ordnance officer or one of his subordinates, the contents were removed and stacked on a loading platform where it was weighed or counted, and the quantity checked with the items noted in the bills of lading or other documents of advice; it was then moved by labor furnished by plaintiff, but always under the supervision of the defendant's officers, into the Government storeroom. A record of the quantities received was then noted by the defendant's ordnance officer on cards in his office, and the total quantity received and on hand computed. Subsequently, the quantities issued from time to time upon presentation of requisitions, or otherwise disposed of by shipments in accordance with orders, were noted on the reverse side of the same cards. In no instance was a notation made upon these cards of facts other than the quantity taken from the storerooms for issuance in compliance with the plaintiff's requisition, or transportation in compliance with orders received. In other words, the defendant's records contained only a bare notation of the quantities received and passed out, but did not indicate whether issued to the plaintiff or otherwise disposed of.

The contents of the foregoing records were in turn extended upon official forms required to be filled out and filed by the ordnance officer. The plaintiff's requisitions were duly preserved by this same official, but later they were either lost or destroyed. In any event, the requisitions for material made by plaintiff were not produced in evidence and no proof of the fact showing the amount of material requisitioned by plaintiff, or issued to it, was made. Nor did the requisitions of the plaintiff, or the material issued thereon, serve as a basis for the subsequent audit made by the defendant which now constitutes the basis of its counterclaim. In the light of these facts and in the absence of proof which was in the defendant's possession from which the exact quantity of material used by plaintiff could be determined, we are not justified in adopting the inferences urged by the defendant that the plaintiff received the material for which the defendant seeks to charge it.

Syllabus

The substance of the defendant's contention is conjectural, supported by inferences seldom persuasive and in no instance conclusive, and very often directly in conflict with clear and explicit evidence obviously true. The foundation of the defendant's contention is an audit, one of several, made sometime in the period 1920 to 1924. The auditor could not justify many discrepancies shown in the defendant's records and he had no authoritative records from which to work.

The facts do not sustain the defendant's counterclaim and the plaintiff is therefore entitled to recover the amount sued for about which there is no controversy.

In view of our conclusion on the defendant's counterclaim, it is unnecessary to examine into the question of the quantity, value, and disposition of the forgings or the probable freight charges for transportation to and from the fabricating factories, the allowance made or not made to the fabricating manufacturers, or the question of the value of the fuses used in testing operations. All of these are subordinate to the main fact. They were the subject of consideration, adjustment, and agreement upon the occasion of the settlement agreement between the parties to the various contracts of manufacturer, and presumably were disposed of upon the basis of a determination satisfactory to the parties at that time.

Plaintiff is entitled to recover $6,981.16, for which judgment will be entered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear and took no part in the decision of the case.

JUTE INDUSTRIES, LTD., v. THE UNITED STATES

[No. E-125. Decided October 20, 1930]

On the Proofs

Income and profits tax; personal-service corporations; corporation as principal stockholder.—Where one of the principal stockholders of a corporation is itself a corporation, it is incapable of ren-

dering personal services within the meaning of the revenue act of 1918 granting the special classification of "personal-service corporation."

The Reporter's statement of the case:

Messrs. Robert Ash and *Thomas J. Reilly* for the plaintiff. *Mr. Lisle A. Smith*, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a domestic corporation, whose place of business was in New York City, and during the years 1917, 1918, 1919, and 1920 acted as the New York sales agent of J. & A. D. Grimond, Ltd., of Dundee, Scotland, manufacturers of burlap and other jute products, and also acted as broker for certain parties who sold jute products manufactured in India. With the exception of a small amount of profit which accrued to the plaintiff from time to time in the way of gains on foreign exchange, plaintiff's sole source of income was from its commissions and brokerages.

II. During the period involved herein plaintiff had outstanding 5,000 shares of preferred stock and 5,000 shares of common stock, each share of each class having a par value of $5.00. Both classes of stock enjoyed the same voting privileges. From June 14, 1917, to June 29, 1921, the principal stockholders of the plaintiff and the amount of stock held by them were as follows:

	From June 14, 1917, to Apr. 1, 1919		From Apr. 1, 1919, to Oct. 1, 1919		From Oct. 1, 1919, to June 29, 1921	
	Preferred	Common	Preferred	Common	Preferred	Common
J. & A. D. Grimond (Ltd.), Dundee	2,499	1,980	2,499	2,970	2,500	2,470
H. N. Gildea, New York	2,500	1,000	2,500	1,000	2,500	1,000
E. B. Paynter, New York	None.	1,000	None.	1,000	None.	1,500
F. M. Richardson, Dundee	None.	1,000	None.	10	None.	10
Total	4,999	4,980	4,999	4,980	5,000	4,980

III. In carrying on its business, the plaintiff had no capital which was a material income-producing factor, and no

part of the income of plaintiff was derived from trading as a principal or from Government contract or contracts.

IV. Messrs. Gildea, Richardson, and Grimond, whose names appear in the tabulation in Finding II hereof as stockholders in the plaintiff corporation, were likewise stockholders in J. & A. D. Grimond, Ltd., of Dundee, during the several fiscal years which are involved herein.

Prior to May, 1917, the personnel of the plaintiff's New York office was composed of Mr. H. N. Gildea, its president; Mr. E. B. Paynter, secretary and treasurer; and a stenographer-bookkeeper. Both Mr. Gildea and Mr. Paynter devoted their entire business time to the business of the plaintiff. In May, 1917, Mr. Gildea became ill and went abroad where he remained until his return to New York in May or June of 1919 to again take up his duties as the president of the plaintiff company.

Mr. Paynter left New York for France in the latter part of May or the early part of June, 1917, where he saw active service with the French Army and later with the Army of the United States. Mr. Paynter returned to New York in March, 1919, and resumed his duties as an officer of the plaintiff company. During his absence he remained an officer of the plaintiff corporation but drew no salary and performed none of his regular duties.

About a month prior to Mr. Paynter's departure, Mr. Grimond cabled to Mr. William McIntosh Cooper at Toronto, where he was engaged as manager of the Jute Industries of Canada, Ltd., requesting him to go to New York, to there take charge of the plaintiff's New York office. Mr. Cooper immediately went to New York in compliance with Mr. Grimond's request and there remained in charge of that office during Mr. Paynter's absence. The only other person employed in the office during that period was a bookkeeper-stenographer.

Neither Mr. Richardson nor Mr. J. B. Grimond was in New York during any part of the period involved herein.

Prior to January, 1919, when Mr. Richardson returned to Dundee to resume his work with J. & A. D. Grimond, Ltd., of Dundee, and with the plaintiff corporation, he was in active military service in the World War as a major in

the Highland regiment. Upon his return to his work the larger portion of his time was taken up in furnishing commodity information and price lists to the plaintiff's New York office and in supervising the manufacture of merchandise which had been sold through that office.

Mr. Grimond devoted a certain portion of his time, just how much does not appear, to answering inquiries made by the plaintiff's New York office, in keeping it informed of conditions in the jute market, and in generally advising with it in the matter of its operations.

In order to successfully conduct its business it was necessary for the plaintiff's New York office to at all times be fully acquainted with the fundamental and market situations in the jute industry, and it was in collecting and transmitting such information to the plaintiff that Mr. Richardson and Mr. Grimond were able to be of service to the plaintiff.

V. The plaintiff duly filed its corporation income tax returns for the fiscal years ending March 31, 1918, 1919, and 1920, and taxes were assessed and paid in accordance with said returns as follows.

For the period January 1, 1918, to March 31, 1918, a tax of $1,512.97 allocable to said period was paid in installments as follows: $1,062.92 on June 16, 1918; $110.77 on March 19, 1919; $332.31 on June 19, 1919; and $6.97 on February 20, 1923.

For the fiscal year ended March 31, 1919, a tax of $4,854.16 was paid on July 30, 1919.

For the fiscal year ended March 31, 1920, a tax of $12,641.58 was paid in installments as follows: $3,160.40 on June 14, 1920; $3,160.40 on March 17, 1921; $3,160.40 on June 1, 1922; and $3,160.40 on November 1, 1922.

VI. Plaintiff duly filed a claim for refund of taxes for the year ending March 31, 1918, in the sum of $1,512.97, and also a claim for refund of taxes paid for the period from April 1, 1918, to March 31, 1920, in the sum of $17,495.75, in each case basing its claim for refund on the ground that it was entitled to classification as a personal-service corporation. Both of these claims for refund were rejected by the Commissioner of Internal Revenue.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

Plaintiff brings this suit to recover $19,008.72 with interest, alleging that this sum has been overpaid on its income and excess-profit taxes.

It appears that during the period in question the plaintiff, a corporation selling goods for J. & A. D. Grimond (Ltd.), of Dundee, Scotland, and other concerns, filed income and excess-profit tax returns for the fiscal years ending March 31, 1918, March 31, 1919, and March 31, 1920. For the period of January 1, 1918, to March 31, 1918, it paid income and excess-profit taxes in the amount of $1,512.97. For the fiscal years ending March 31, 1919, and March 31, 1920, it paid income and excess-profit taxes in the amount of $17,495.75.

For the taxes so paid the plaintiff duly filed claims for refund on the ground that it was entitled to classification as a personal-service corporation under the provisions of the revenue act of 1918. These claims for refund were denied, and plaintiff now brings this suit to recover the amount so paid. The sole issue in the case is whether the plaintiff was entitled to be classified as a personal-service corporation.

The revenue act of 1918 (40 Stat. 1057) provides, among other things—

"SEC. 200. That when used in this title—

*　*　*　*　*

"The term 'personal-service corporation' means a corporation whose income is to be ascribed primarily to the activities of the principal owners or stockholders who are themselves regularly engaged in the active conduct of the affairs of the corporation and in which capital (whether invested or borrowed) is not a material income-producing factor; * * *."

The defendant contends that the plaintiff was not "a corporation whose income is to be ascribed primarily to the activities of the principal owners or stockholders who are themselves regularly engaged in the active conduct of the affairs of the corporation," and we think this contention must be sustained.

Opinion of the Court

The taxes paid were for a period beginning with March 31, 1917, and ending with March 31, 1919, being the three fiscal years ending March 31, 1918, March 31, 1919, and March 31, 1920. During the period in question the plaintiff had issued and outstanding 5,000 shares of preferred stock and 5,000 shares of common stock, each share of each class having a par value of $5.00. The evidence shows without dispute that from June 14, 1917, to April 1, 1919, the corporation of J. & A. D. Grimond, of Dundee, Scotland, owned 2,499 shares of plaintiff's preferred stock and 1,980 shares of its common stock; that from April 1, 1919, to October 1, 1919, said corporation owned 2,499 shares of plaintiff's preferred stock and 2,970 shares of its common stock; and that from October 1, 1919, to June 29, 1921, the said Dundee corporation owned 2,500 shares of plaintiff's preferred stock and 2,470 shares of its common stock. In other words, during the periods above named the Dundee Corporation owned only one share less than half or half of the preferred stock, and of the common stock from about two-fifths to more than half thereof. It is apparent that it was one of the principal stockholders, whose activities are referred to in the statute as necessary to create a "personal-service corporation." The statute further provides that such stockholders must be "themselves regularly engaged in the active conduct of the affairs of the corporation." This Dundee corporation had nothing to do with the active conduct of the affairs of the plaintiff. It is quite clear that this part of the statute refers to the management of the concern which claims to be a personal-service corporation, or some kind of personal service connected with the operation of its affairs. From the very nature of the thing required, being a corporation, the Dundee company could not perform personal services for the plaintiff or bring itself within the provisions of the statute. For these reasons alone we are clear that plaintiff was not within the meaning of the law a "personal-service corporation" during the period in question.

What was said above is sufficient to dispose of the case, but the defendant says that other stockholders, who, to-

gether with the Dundee corporation, owned practically all the stock of the plaintiff, were not regularly engaged in the active conduct of the affairs of the corporation, being absent from New York, where the plaintiff carried on its business during nearly all of the period involved. One of these stockholders was H. N. Gildea, who was president of the company and during most of the period in question owned half of the preferred stock and 1,000 shares of the common stock. He was therefore one of the principal stockholders, but appears to have been abroad from May, 1917, until May or June, 1919, as was also Mr. Paynter, who was another of the principal stockholders and secretary of the plaintiff. During the absence of these officers of plaintiff, its business was carried on by W. M. Cooper with the assistance of a bookkeeper-stenographer.

It may well be argued, as counsel for defendant does, that the fact that Gildea and Paynter had nothing to do with the management of the affairs of the plaintiff during the period mentioned in the preceding paragraph is also sufficient to prevent the plaintiff from being entitled to classification as a personal-service corporation, but we do not find it necessary to so decide.

It follows from what has been stated above that the plaintiff's petition should be dismissed, and it is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear and took no part in the decision of this case.

ISIDOR HELLMAN v. THE UNITED STATES

[No. E-199. Decided October 20, 1930]

On the Proofs

Income tax; partnership; individual incomes; agreement; conclusiveness of bookkeeping entries.—Partners may adjust between themselves their interest in the net earnings of the partnership in any proportion that they may agree upon, and, when so fixed,

Reporter's Statement of the Case

they are taxable accordingly. Bookkeeping entries do not constitute income unless there is the right of ownership in the amount disclosed by such entries, and where they are not in accordance with the agreement they do not determine the taxable income of any one partner.

Same; relinquishment of partnership interest for stock of substituted corporation; gain subsequent to taxable year.—Where under a partnership agreement a corporation is to be substituted for the partnership and one of the partners is to receive a stated amount of stock in payment of all his interest in the partnership and claims against the same, and the corporation so formed takes no action in furtherance of the arrangement during the taxable year, the transaction represents no possible gain accrued or received during the taxable year.

The Reporter's statement of the case:

Mr. James S. Y. Ivins for the plaintiff. *Mr. Harry M. Lewy*, and *Holmes, Brewster & Ivins* were on the briefs.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Messrs. Alexander H. McCormick, McClure Kelley, C. M. Charest* and *Eldon O. Hanson* were on the briefs.

The court made special findings of fact, as follows:

I. The firm of Smith & Kaufmann was established as a partnership in 1881. In 1887 plaintiff became connected with it as an employee and was admitted as a partner in 1892. The firm was always prosperous, earning profits in every year except one. When plaintiff became a partner he was given an interest in the profits without contributing any capital, and through the accumulation of profits he gradually acquired a capital interest. From December 31, 1910, the partnership consisted of Julius Kaufmann, the plaintiff, John Roberts, Edward M. C. Tower, and Edward Wackerhagen. December 21, 1915, Kaufmann withdrew from the partnership and became a creditor, and the partnership was continued by the other members. The partnership thus continued until July 26, 1918, when John Roberts retired therefrom, and a new partnership contract was entered into evidenced in two new documents, which are annexed to the petition in this case as plaintiff's Exhibits B

and C, and by reference are made a part of this finding. Plaintiff's Exhibit C, which was an agreement between the new partners fixing their distributive shares in the partnership to continue from that time forward, was agreed upon and was executed or was intended to be executed immediately before the execution of plaintiff's Exhibit B, which was a partnership agreement signed by the plaintiff, Edward M. C. Tower, Edward Wackerhagen, Fritz Kaufmann, and Ernst B. Kaufmann, the members composing the new partnership, and by Julius Kaufmann, who had retired but who was continued as a creditor. These two documents represented but a single agreement or understanding between the partners, which was fully arrived at before either was drawn. They were both drawn in the light of a complete understanding and were executed simultaneously.

II. The agreement, Exhibit B, provided that the partners were entitled to draw salaries and interest at 6 per cent upon their capital contributed or accumulated. After payment of expenses and the salaries and interest the net profits of the firm were to be credited to the partners but not paid out in specified percentages. In this agreement plaintiff's percentage was 20 per cent. By agreement, Exhibit C, which was made by and between plaintiff and all of the other partners, it was provided that each of the other partners should be entitled to 199/800ths of plaintiff's 20 per cent interest in the net profits provided in the agreement, Exhibit B, which was annexed to and made a part of agreement, Exhibit C, each of the other four partners assuming a similar proportion of any loss. The agreement above referred to as Exhibit C, which was between plaintiff as party of the first part and the other four partners as parties of the second, third, fourth, and fifth parts, provides so far as material here, as follows:

"Whereas the party of the first part desires the parties of the second, third, fourth, and fifth parts to become members of a new firm to be known as Smith & Kaufmann, to be composed of the parties hereto; and

"Whereas the party of the first part desires the parties of the second, third, fourth, and fifth parts to execute simultaneously herewith articles of copartnership, a copy of

which is hereto attached marked 'Exhibit A,' and hereby made a part hereof; and

"Whereas the said articles of copartnership provide that the party of the first part is to receive twenty (20%) per cent of the net profits to be earned by the said firm and to bear twenty (20%) per cent of the losses that are to be sustained by the new firm:

"Now, therefore, in consideration of the premises and in consideration of the sum of one ($1.00) dollar by each of the parties duly in hand paid, the receipt whereof is hereby acknowledged, this agreement

"Witnesseth:

"First. The parties of the second, third, fourth, and fifth parts hereby promise and agree that they will simultaneously with the execution of this agreement duly execute the original of the articles of copartnership of which a copy is hereto annexed and marked 'Exhibit A.'

"Second. The party of the first part agrees to and does hereby sell, assign, transfer, and set over to each of the parties of the second, third, fourth, and fifth parts one hundred ninety-nine eight hundredths (199/800) of the interest of twenty (20%) per cent of the party of the first part in all net profits which may hereafter be made by the firm of Smith & Kaufmann under Schedule A hereto attached, and the parties of the second, third, fourth, and fifth parts, each for himself, hereby agrees to bear and assume such proportionate amount of any losses that may result under Schedule A during the term thereof which is to and including the 31st day of December, 1921.

"[It is expressly understood and agreed that this agreement shall only relate to such net profits as may be earned by the firm of Smith & Kaufmann from the date hereof to December 31st, 1921, and that it does not affect the interest of the party of the first part, his legal representatives or assigns in the good will in the firm of Smith & Kaufmann, the machinery account, nor the reserve of one hundred seventy-five thousand ($175,000) dollars at the store, nor the reserve of seventy-five thousand ($75,000) dollars at the mill, nor in the life insurance policies aggregating one hundred thousand ($100,000) dollars on the life of Mr. Julius Kaufmann, nor anything else except the actual profits which may be earned from the date hereof to December 31st, 1921. Upon the dissolution or termination of the firm of Smith & Kaufmann as formed under Schedule A hereto attached, the party of the first part shall have the same share in the assets of the said firm as he would have had had this agreement not been executed, except that the

parties of the second, third, fourth, and fifth parts are each entitled to be credited with one hundred ninety-nine eight hundredths (199/800) of the share of twenty (20%) per cent of the party of the first part in such net profits as may be earned by the said firm of Smith & Kaufmann from the date hereof to December 31st, 1921, or until the date of such dissolution or termination, or until, such earlier date should said firm be dissolved or terminated before the day aforesaid.]

"It is further expressly understood and agreed that no profits shall actually be paid out during the term of Schedule A but shall merely be credited to the account of the parties entitled to receive same.

"The interests of the parties of the second, third, fourth, and fifth part in the net profits provided for by Schedule A shall be in addition to those which may accrue to them or any of them under this agreement."

The agreement, Exhibit B, referred to in the aforementioned agreement and attached thereto as Exhibit A, provided that the partners should be entitled to yearly salaries payable monthly of $7,500 for plaintiff, Tower, and Wackerhagen, and $6,000 for Fritz and Ernst Kaufmann.

The sixth article of this agreement was as follows:

(6) The net annual profits of the said business after a deduction of all losses and of all proper charges and expenses shall be credited to the partners, but not paid out, as follows: Each of the said partners shall be entitled to such portion of the said net annual profits as may equal six (6%) per cent per annum upon the capital contributed by such partner to the said business, as hereinbefore provided, and also upon such accrued capital as may at any time be placed to the credit of said partner upon the books. Net profits shall be credited to the partners, but not paid out, in the following proportions:

Isidor Hellman, twenty (20%) per cent.
Edward M. C. Tower, twenty-five (25%) per cent.
Edward Wackerhagen, twenty-five (25%) per cent.
Fritz Kaufmann, fifteen (15%) per cent.
Ernst B. Kaufmann, fifteen (15%) per cent.

III. There were no other agreements between the partners except the one of November 18, 1919, hereinafter mentioned. Under these two agreements plaintiff's interest in the profits until Wackerhagen's death was 1/10 of 1% over and above his salary and 6 per cent on his capital. When the new

partnership arrangement and the interests of the partnership were agreed upon, commencing July, 1918, plaintiff was contemplating retiring and desired only a small interest in the partnership sufficient to produce a nominal return in addition to his salary and the interest which he was receiving upon his capital. It was understood by all that his distributive share in addition to his salary and interest on his capital was to be 1/10 of 1% of the net earnings and it was also understood by all that the partnership agreement would provide for this. The partnership agreements were prepared by attorneys for the partners and they deemed it best to embody the understanding of the partners with reference to their distributive share in the two instruments of July 26, 1918, Exhibits C and B.

IV. Strained relations developed among the partners because of national antipathies brought about by the war. Negotiations looking toward a termination of plaintiff's interest in the partnership were had in July, 1919, but did not culminate in a definite agreement. Edward Wackerhagen died August 20, 1919, which automatically terminated the agreement of July 26, 1918, evidenced by Exhibit C hereinafter quoted, leaving in force the part evidenced by Exhibit B.

V. The books of the partnership were customarily closed on June 30 and December 31 of each year. They were closed on June 30, 1919, but were not closed and no determination of profits was made upon the death of Wackerhagen. The books were next closed December 31, 1919.

VI. After Wackerhagen's death plaintiff expected to be able to work in harmony with the other partners but it developed that this could not be done and negotiations continued looking to a separation of their business relations.

After many conferences it was agreed that plaintiff should immediately withdraw from the partnership; that the remaining partners would form a corporation to take over the entire business and assets; and that such corporation should issue to plaintiff $450,000, par value of first preferred stock, for his interest. For some time plaintiff placed a value in excess of $450,000 upon his interest but it was finally decided

that he would surrender his interest for $450,000. This figure was arrived at by bargaining and not by the computation of shares and profits. On the basis of a net worth at the beginning of 1919 of $1,142,844.80, the firm had a net income for 1919 of $531,141.26, a sum well in excess of a normal return on the investment. Similarly, in the year 1920, the same business operated by a corporation earned a net profit of $472,654.21 after paying salaries of $12,000 each to three officials on the same capital which the partnership had at the end of 1919. The plaintiff's tangible capital interest, as shown by the partnership books at January 1, 1919, was $329,189.81 made up of $255,891.06 shown on the capital account and $73,298.75 constituting his share of a reserve carried by the partnership to meet contingencies. This was reduced by a withdrawal by plaintiff during 1919 of $891.06, leaving him $328,298.75 tangible book capital to sell.

VII. Plaintiff's distributive share in the profits of the firm for 1919 consisted of (a) a salary of $7,500; (b) interest at 6 per cent on his share of the capital account; (c) from January 1 to Wackerhagen's death, August 20, 1/10 of 1% of the net profits after payment of salaries and interest; and (d) 20% of the net profits after salaries and interest from August 21 to November 18, the latter date being the date on which plaintiff withdrew from the business, as will hereinafter appear.

The interest on capital account, amounting to $15,300, was withdrawn by plaintiff, as was the salary of $7,500, and they were not among the items for which under the agreement hereinafter referred to he was to receive $450,000 of stock. The distributive share of income, as indicated under (c) and (d) above, amounting to $26,530.84, had not been withdrawn and was included. The partnership of Smith & Kaufmann had a valuable good will and plaintiff agreed to sell his interest therein as well as the tangible book capital.

VIII. After the plaintiff and the other partners through negotiations had arrived at an understanding their attorneys prepared an agreement, attached to the petition as Exhibit D and by reference made a part of this finding.

This agreement was executed on November 18, 1919, by the plaintiff, as party of the first part, and Julius Kaufmann, who was a creditor of the partnership, but not a partner, as party of the second part, the executors of the estate of Wackerhagen as party of the third part, and Tower, Fritz Kaufmann, and Ernst Kaufmann as parties of the fourth part. This agreement, so far as material here, provided:

"First. (*a*) The parties of the fourth part agree that they will on or about January 2nd, 1920, form and organize a corporation under the laws of the State of New York, or such other State as may be unanimously agreed upon in writing by all of the parties hereto, under the name and style of Smith & Kaufmann, Inc., for the purpose of continuing and carrying on the business in which the firm of Smith & Kaufmann, in dissolution, is now engaged, which corporation to be formed shall be hereinafter designated as 'the corporation.'

"(*b*) The corporation shall have three classes of stock, to be known, respectively, as first preferred stock, second preferred stock, and common stock.

"(*d*) The amount of the capital with which the corporation will commence business shall be one million ($1,000,000) dollars or more.

"(*g*) The voting power of the corporation shall, so far as is permissible by law, be vested exclusively in the holders of the common stock.

"(*h*) The corporation is to take over from the said copartnership all of its assets of every kind, nature, and description, as well as the assumption and payment of all its debts and liabilities, as appear from the books of account of the copartnership, in consideration of which the corporation is to issue to the respective parties shares of stock and make such payments as hereinafter set forth in detail.

"Second. The parties of the fourth part hereby agree that on or before the 31st day of December, 1919, the firm of Smith & Kaufmann, in dissolution, will pay to the party of the second part, his legal representatives, or assigns, the total amount of the then indebtedness of the said firm of Smith & Kaufmann to the party of the second part, and the party of the second part hereby agrees that immediately upon receiving said payment he will subscribe at par to one thousand seven hundred and fifty (1,750) shares of the first preferred stock, class B of the corporation.

"Third. The parties of the fourth part agree that upon the execution of this agreement by the party of the first

part, there will be advanced to him as a loan the sum of fifty thousand ($50,000) dollars due on January 2nd, 1920, without interest. The party of the first part hereby acknowledges the receipt of the said loan of fifty thousand ($50,000) dollars and agrees to repay the same at the time of the formation of the corporation, which shall be on or about January 2nd, 1920. The corporation shall issue to the party of the first part four thousand five hundred (4,500) shares of its first preferred stock, class A in full payment of his interest in said copartnership, and of all his claims against said copartnership, it being understood and agreed that the party of the first part shall not be entitled to any other shares of stock of the corporation. The parties of the fourth part agree that they or the corporation will on or about the 2nd day of January, 1920, purchase for cash from the party of the first part fifteen hundred (1,500) shares of the first preferred stock at par, and the party of the first part agrees to sell the same. The parties of the fourth part further agree that the party of the first part shall also be entitled to receive at the time of the formation of the corporation any unpaid salary at the rate of seventy-five hundred ($7,500) dollars per annum up to December 31st, 1919, and shall further be entitled to receive interest at the rate of six (6%) per cent per annum on the net amount of his capital account, as the same now appears on the books of the firm of Smith & Kaufmann up to December 31st, 1919.

"Sixth. The parties of the fourth part agree to and do hereby jointly and severally guarantee to the parties of the first, second, and third parts, their respective legal representatives, successors, and assigns, that the shares of the first preferred and second preferred class A stock shall earn annual dividends at the rate of six per cent payable quarterly on January first, April first, July first, and October first, in each year.

"Seventh. The parties of the fourth part each hereby respectively agrees to accept from said corporation in full payment of all of his interest and claims against said copartnership, the following:

"(*a*) Such number of shares of the second preferred stock, class B, of a total aggregate value, figured at par, as shall be equal to his capital account as shown by the books of the firm of Smith & Kaufmann, in dissolution, on the 31st day of December, 1919, plus

"(*b*) One-third of the total issue of common stock of the corporation.

"Eighth. The parties of the fourth part agree to be incorporators, directors, and officers of the corporation and shall be entitled to receive from the corporation yearly salaries as such in the amounts hereinafter in this paragraph set forth beside their respective names:

Edward M. C. Tower	$12, 000
Fritz Kaufmann	12, 000
Ernst B. Kaufmann	12, 000

That none of said salaries shall be enlarged so long as any first preferred stock of the corporation or second preferred stock, class A, hereinbefore mentioned, remains outstanding. The parties of the fourth part further agree that so long as any of the first preferred stock and second preferred stock, class A, remain outstanding they will devote their best efforts, entire time, and attention to the business of the corporation, and will not engage in any other business."

The articles of incorporation for the corporation known as Smith & Kaufmann were filed with the secretary of state of New York, December 31, 1919. The corporation was organized on January 2, 1920, on which date the corporation took over the assets of the partnership and authorized and issued to plaintiff $450,000 par value of its first preferred stock for his interests.

IX. After the execution of this agreement plaintiff ceased to be a member of the partnership or to participate in its earnings beyond his salary of $7,500 and 6% interest on his capital account until the end of the year.

Plaintiff had been in charge of the books of the partnership up until the time of his withdrawal from the firm on November 18, 1919, and supervised the bookkeeper. At June 30, 1919, when the books were closed, no profits were credited to plaintiff. From January 1 until Wackerhagen's death his interest was only 1/10th of 1%. At the end of the year 1919 plaintiff was no longer in the firm and the amount he would receive on incorporation of the business had been fixed by the agreement of November 18. The net earnings of the partnership for the last six months of the year 1919 amounted to $300,940.68. Upon closing the books on December 31, 1919, plaintiff was credited thereon at December 31 with a distributive share of $121,701.25, which was equivalent to 40.44% thereof, or $95,170.41 in excess of what his distributive share for the whole year had actually

Reporter's Statement of the Case

been. The method adopted by Fritz Kaufmann, Ernst Kaufmann, and Tower at the end of 1919 for computing the distributive share to be credited upon the books had no relation to the distributive interests of the partners as fixed by the partnership agreements. What was done was to take the arbitrary figure of $450,000, at which plaintiff had agreed to sell his interest to the corporation to be formed, and to subtract therefrom his capital as shown by the books, or $328,298.75. The difference of $121,701.25 was "charged to Hellman as coming from the profits of the fall." "Fall" was the bookkeeper's expression used in bookkeeping to denote the last six months of the year. In other words, to determine plaintiff's share of the partnership profits for the last six months of 1919, his capital and reserve accounts were subtracted from the price at which he had agreed to sell his entire interest in the capital, income, good will, increment, and any other values not reflected by the books. The entire net earnings of the partnership for the calendar year 1919 were $531,141.26.

X. Fritz Kaufmann, Ernst Kaufmann, and Tower prepared a return for the partnership of Smith & Kaufmann for the entire calendar year 1919. In this return distribution was made under "Schedule C—Member's Share of Income," as follows:

Edward M. C. Tower	$116, 066. 86
Fritz Kaufmann	84, 566. 86
Ernst Kaufmann	84, 566. 86
Julius Kaufmann	26, 000. 00
Isidor Hellman	121, 701. 25
Estate of Edward Wackerhagen	124, 239. 43
Total	557, 141. 26

There appeared in part of Schedule C of this return immediately preceding the above entries the following: "Enter below the shares of net income (whether distributed or not) of each member of the partnership." With the exception of $26,000 shown opposite the name of Julius Kaufmann, the above distribution equaled the net income of the partnership of $531,141.26.

Julius Kaufmann was not a member of the firm. He was a creditor. The firm paid him $26,000, but this was not as a distributive share of a partner but as a bonus for relin-

quishing his position as a creditor and becoming a stockholder of the corporation and as compensation for certain services rendered.

Upon receipt of information that a return was being filed showing the distributive shares as above set forth, plaintiff objected thereto but without avail and the same was filed on March 15, 1920.

XI. In his individual income-tax return filed for 1919 plaintiff reported as income a salary of $7,500 and the interest at 6% on his capital account, but no other income from Smith & Kaufmann, believing that the $121,701.25 which the other partners had shown on the partnership return was a distribution to him of surplus previously taxed, and not of profit. Thereafter a revenue agent made an investigation and audit of the partnership books and the returns of the individual partners and determined that plaintiff's distributive share of the partnership earnings from January 1 to August 20, 1919 (the date of Wackerhagen's death), was $337.60, being 1/10th of 1% of $337,601.76, the latter amount being 232/365ths (January 1 to August 20, 1919) of $531,141.26, the net earnings of the partnership for the entire year 1919. After Wackerhagen's death on August 20, 1919, which ended the plaintiff's distributive share as set forth in Exhibit C hereinafter referred to, plaintiff became entitled to a distributive share of 20% of the net earnings of the partnership from that date. From and after August 20, 1919, the revenue agent applying the same method determined plaintiff's distributive share in excess of his salary and interest to be 20% to December 31, 1919, amounting to $38,707.93, which, together with his 1/10th interest in the profits to August 20, 1919, amounted to $39,045.53. Upon receipt of the result of the audit of the revenue agent plaintiff took the position that he was taxable upon a distributive share of only 20% of the earnings of the partnership as determined by the revenue agent from August 20, to November 18, 1919, but, in order to dispose of the matter, plaintiff filed an amended return for 1919 conforming to the audit of the revenue agent and reported in said return the amount of $39,045.53 more income than he had shown in his original return, the last-mentioned amount being the

amount determined by the revenue agent to be plaintiff's distributive share of the net earnings of the partnership for 1919 exclusive of his salary and interest on his capital account. The Commissioner of Internal Revenue mailed notices to the plaintiff and to Fritz and Ernst Kaufmann proposing to assess the tax as shown in the revenue agent's report. The other members objected thereto and finally the Commissioner of Internal Revenue took the position that plaintiff's distributive share of the net earnings of the partnership of Smith & Kaufmann for 1919 was $121,701.25, as shown on the partnership return filed. Based upon that computation, he determined an additional tax of $54,633.66 which was assessed in 1924 and was paid by plaintiff under written protest. Subsequently plaintiff filed a claim for refund for $44,194.79, being the amount of tax paid in excess of the tax shown in his amended return made in conformity with the revenue agent's report. This claim for refund was rejected by the commissioner December 15, 1924.

Plaintiff filed his income tax return for 1920 on December 21, 1921.

The court decided that plaintiff was entitled to recover, with interest.

LITTLETON, *Judge*, delivered the opinion of the court:

A new trial was allowed in this case. The partnership, Smith & Kaufmann, made a return for 1919 on which plaintiff's distributive share of the partnership profits for that year was shown as $121,701.25. Plaintiff had withdrawn from the partnership in November, 1919, and had nothing to do with the preparation of this return. Upon receipt of information that the return showed his 1919 distributive share as stated he objected to it but the return as prepared was filed and the Commissioner of Internal Revenue held that in addition to certain other income, consisting of his salary of $7,500 and 6% interest upon his capital in the partnership, included by plaintiff in his original individual income-tax return, the amount of $121,-701.25 represented his distributive share of the net earnings of the partnership for 1919 and increased his income ac-

cordingly. Plaintiff insists that he was not taxable in 1919 upon the $121,701.25 and as a result of the action of the commissioner plaintiff brings this suit to recover $44,194.79.

Plaintiff contends, first, that the two documents, Exhibits C and B, referred to in the findings and executed by all of the partners on July 26, 1918, upon the retirement of John Roberts, constituted in legal effect only one partnership agreement and fixed his interest in the partnership profits at ⅕₀ of 1% of the net earnings until the date of death of Wackerhagen on August 20, 1919, and thereafter until he withdrew he was taxable upon 20 per cent of the net earnings under said partnership agreement; that even if these two instruments be regarded as separate contracts, the result is the same, for the transfer by plaintiff to each of the other partners of $^{199}/_{800}$ of the 20 per cent interest in the net earnings to which he would otherwise have been entitled in consideration of the assumption by each of the other partners of such proportionate amount of any losses that might result was an agreement between all the partners fixing their distributive share; secondly, that on November 18, 1919, he withdrew and retired from the partnership and agreed with the other partners, as evidenced by Exhibit D referred to in the findings, to sell and transfer all of his interest in and claims against the partnership to a corporation to be organized by certain of the other partners in exchange for the issuance by such corporation to him of $450,000, par value of its first preferred stock; that this agreement was not a sale completed in 1919 giving rise to a taxable gain, because the corporation to which he agreed to sell was not organized and the stock was not authorized or issued therein until January 2, 1920; that the action of the other partners in showing the amount of $121,701.25 on the partnership return for 1919 as his distributive share of the partnership earnings for 1919 was wrong; that the figure of $121,701.25 was purely an arbitrary one representing merely the difference between $450,000, at which he agreed to sell, and $328,298.75, his tangible capital and his share of the reserve of the partnership; that, in no event, could his distributive share of the partnership net earnings have exceeded 20 per cent of the net earnings of $531,141.26,

or $106,228.25; thirdly, that the action of the other partners in showing his distributive share of the partnership profits for 1919 at $121,701.25 and the action of the commissioner in including that amount in his income resulted in shifting the burden of the other partners for their lawful taxes to him.

Defendant contends, first, that plaintiff was bound by the partnership return showing his distributive share as $121,701.25, and, secondly, assuming that the amount did not represent his share of the partnership earnings, it was nevertheless taxable to him as a gain realized in 1919 upon the sale by him in that year of his interest in the partnership.

The two instruments executed by plaintiff and the other members of the partnership on July 26, 1918, forming a new partnership arrangement upon the retirement of John Roberts, constituted in our opinion but one agreement between the new partners fixing their distributive shares. Under them, plaintiff's distributive share was $\frac{1}{10}$ of 1% of the net earnings until December 31, 1921, the date fixed for termination of the partnership unless before that time it should be terminated for any reason, in which event it was provided that plaintiff's distributive share should become the full 20 per cent of the net earnings. Partners may adjust between themselves their distributive share in such proportion and in such manner as they may desire. Cf. *Leo Schwartz*, 7 B. T. A. 223. The facts show that when the new partnership arrangement was formed in July, 1918, the plaintiff was contemplating retiring and desired only a small interest sufficient to produce a nominal return in addition to his salary and the interest which he was receiving upon his capital. It was understood by all that his distributive share was to be only $\frac{1}{10}$ of 1% of the net earnings and it was plaintiff's desire that the partnership agreement provide for this. The partnership agreements were prepared by the attorneys for the partners and they deemed it best to embody the understanding of the partners with respect to their distributive shares in the two instruments in question. They were prepared at the same time and were executed simultaneously by all of the partners.

Opinion of the Court

The defendant, relying upon *Ormsby McKnight Mitchell*, 1 B. T. A. 143, *Mitchel* v. *Bowers*, 15 Fed. (2d) 287, and *Bing* v. *Bowers*, 22 Fed. (2d) 450, contends that the fixing of plaintiff's distributive share at $\frac{1}{10}$ of 1% of the net earnings of the partnership was merely an assignment by him of 199/800ths of his interest in the partnership profits to each of the other partners and did not relieve him of the tax upon full 20 per cent of the net earnings. These cases are not in point. They did not involve instruments constituting a part of a partnership agreement. The transactions there considered were entirely independent of the agreement between the partners, and the person to whom the assignment was made was not a partner and was not made one thereby. Partners may adjust between themselves their interest in the net earnings of the partnership in any proportion that they may agree upon, and, when so fixed, they are taxable accordingly. Certainly is this true when the interests are fixed at the formation of the partnership. The plaintiff did not assign a portion of his income to another. Under the agreements he was never entitled to receive 796/800ths of 20 per cent of the net earnings, which the partnership agreement gave to the other partners. Under no circumstances could he ever withdraw any portion of it, or interest upon it, nor could it ever be credited to his capital account. The fact that it might have been credited to him on the books and simultaneously credited to the other partners did not make it income to him in view of the provisions of the partnership agreements. Bookkeeping entries do not constitute income unless there is the right of ownership in the amount disclosed by such entries. Plaintiff's distributive share of the partnership profits upon which he was taxable from January 1 to August 20, 1919, the date of the death of Wackerhagen, was therefore $\frac{1}{10}$ of 1%. The partnership books were closed on June 30 and December 31 of each year. Upon the death of Wackerhagen the books were not closed to determine the income of the partnership to that date. The revenue agent who audited the books and the returns of the individual partners therefore accordingly determined plaintiff's distributive share of the partnership earnings to that

date as \$337.60, being $\frac{1}{10}$ of 1% of \$337,601.76, the latter amount being 232/365ths (January 1 to August 20) of \$531,141.26, the net earnings of the partnership for the entire year 1919. This action of the revenue agent was correct. *Peter W. Rouss*, 4 B. T. A. 516; *Rouss* v. *Bowers*, 30 Fed. (2d) 628.

Upon the death of Wackerhagen on August 20, 1919, plaintiff became entitled under the partnership agreement to the full 20 per cent of the partnership profits from that time forward. On November 18, 1919, due to the strained relations between the parties, and after much discussion and bargaining by the plaintiff he agreed to retire from the business forthwith and for the remainder of the year 1919 to receive only his fixed salary of \$7,500 and 6 per cent upon his capital account.

The other partners agreed to form a corporation and to take over the entire business and all of the assets of the partnership, both tangible and intangible, and it was further agreed that the corporation when organized would issue \$450,000 of par value of the first preferred stock to plaintiff in payment for all of his interest in the partnership and all claims that he might have against the same. The agreement of November 18 was accordingly executed. Under that agreement plaintiff was not, therefore, a member of the partnership and had no right to share in any of its earnings from the date of the agreement until the end of the year 1919. All that the other partners agreed to pay him and all that he was entitled to receive from the partnership was his salary of \$7,500 and 6 per cent interest on his capital account, exclusive of the reserve of which plaintiff's share was \$73,000. As a matter of law, therefore, plaintiff was not taxable upon any portion of the net earnings of the partnership from November 18 to December 31, 1919. However, after the revenue agent's first investigation, the plaintiff, desiring to have the matter ended, filed an amended return and voluntarily paid the tax upon 20 per cent of the earnings, \$193,539.50 (i. e., \$531,141.26 minus \$337,601.76, the proportion up to August 20), from August 20, 1919, to December 31, 1919, determined as hereinbefore set forth.

The amount of tax so paid upon income thus determined was $4,138.77 in excess of what he should have been required to pay, but no claim for refund was made in respect to that amount and no claim is now made by plaintiff with regard thereto. The total income from the partnership upon which plaintiff voluntarily paid the tax, and which he claims was the amount upon which the commissioner should have taxed him, was $61,845.53 made up of his salary of $7,500, interest on capital of $15,300, his share of partnership profits of $39,045.53. The revenue agent first determined this amount as being the correct income of plaintiff and the commissioner upon audit mailed notices to the partners proposing to assess the tax to plaintiff and additional taxes against the other members of the partnership upon that basis. The other partners objected and on appeal the commissioner finally decided that plaintiff's distributive share of the partnership profits for 1919 was $121,701.25, as shown on the partnership return, and he taxed the plaintiff and the other partners upon that basis. This amount, in addition to the items of salary and interest, was included in plaintiff's income for 1919 resulting in an additional tax of $54,633.66. In this the commissioner erred. The distributive share of the partnership earnings and the total amount of income therefrom upon which plaintiff was taxable in no event exceeded $39,045.53 upon which he has paid the tax without protest. Cf. *Maurice L. Goldman et al.*, 15 B. T. A. 1341. Even on the commissioner's theory that plaintiff was taxable upon 20 per cent of the net earnings of the partnership for the entire year 1920 his distributive share of the net earnings of $531,141.26 could not exceed $106,228.65.

The next question is whether plaintiff made a completed sale of his interest in 1919 and derived a taxable gain of $121,701.25 thereon. In our opinion there was no completed sale in 1919 and no taxable gain was derived by plaintiff in that year. At most plaintiff only agreed in 1919 to sell his interest in the tangible and intangible assets of the partnership to a corporation thereafter to be organized. He sold nothing to the partners. They did not obligate themselves to pay him any amount for his interest, but only to

have the corporation, if and when it should be organized, issue him stock. The corporation was not completely organized until 1920 and plaintiff received nothing which could constitute income until January 2, 1920.

The defendant contends that if the commissioner was wrong in taxing the amount of $121,701.25 to the plaintiff as his distributive share of the partnership earnings, there was a completed sale by him of his partnership interest in 1919 which gave rise to a gain derived in that year; that the partnership had no intangible assets of any value and since plaintiff employed the accrual method of accounting he was taxable upon the profit of $121,701.25 representing the difference between his interests in the tangible book capital and $450,000 at which he sold.

It is not clear whether plaintiff employed the accrual or cash receipts and disbursements method of accounting, but we deem it unnecessary to decide this point. It is clear from the provisions of the agreement of November 18, 1919, and the facts, that a completed sale was not made in 1919. The articles of incorporation were filed with the secretary of state on December 31, 1919, but this did not complete the sale. The parties to the agreement of November 18, 1919, were not authorized to act and did not act for the corporation to be formed, and even after the corporation came into existence it was not bound by the agreement until it took action thereon. *Morse* v. *Tillotson & Wolcott Co.*, 253 Fed. 340. *Younker Bros., Inc.*, 8 B. T. A. 333. The corporation acted on January 2, 1920, at which time it authorized and issued to plaintiff $450,000 par value of preferred stock. If a gain was derived by plaintiff it accrued and was received by him on that date. The year 1920 is not before us.

Plaintiff is entitled to recover. Judgment for $44,194.79 will be entered in his favor with interest. It is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear this case and took no part in the decision thereof.

Reporter's Statement of the Case

ASSOCIATED FURNITURE CORPORATION v. THE UNITED STATES[1]

[No. J-350. Decided October 20, 1930]

On the Proofs

Excise tax; carrying on or doing business; holding company; initial activities pursuant to purpose of organization.—Where a corporation is organized for the conduct of business, completes its organization, in furtherance of its purpose acquires all the capital stock of certain other corporations engaged in the same business as that for which it was organized, and enters into contracts of employment for the carrying on of that business, it is already "carrying on or doing business," within the meaning of the excise tax laws.

Same; average value of capital stock; existence for part of year only.—See *Alaska Consolidated Canneries* v. *United States*, 66 C. Cls. 713.

The Reporter's statement of the case:

Mr. Thomas G. Haight for the plaintiff. *Messrs. Robert H. Montgomery, J. Marvin Haynes, Roswell Magill,* and *James O. Wynn* were on the briefs.

Mr. Arthur J. Iles, with whom was *Mr. Assistant Attorney General Charles B. Rugg,* for the defendant. *Mr. Assistant Attorney General Herman J. Galloway* was on the brief.

The court made special findings of fact, as follows:

I. The certificate of incorporation of the "Associated Furniture Corporation" was received and filed in the office of the secretary of state of the State of Delaware on June 2, 1925. The principal office of the corporation in the State of Delaware is in the city of Wilmington.

The nature of the business of the corporation and the objects and purposes proposed to be transacted, promoted, or carried on by it, as stated in its certificate of incorporation, include the manufacturing, buying, and selling, or otherwise dealing or trading in furniture, fixtures, furnishings, and other kinds of goods, wares, and merchandise; the acquisi-

[1] Certiorari applied for.

tion of the good will, business, stock, assets, etc., of any person, firm, or association, or corporation, doing business of a character similar to that of the plaintiff; the acquisition, ownership, and disposal of the shares of stock or voting trust certificates, participation certificates, or other certificates issued in respect of the shares of stock of any class of other corporations or associations; the issuance of its own stock of any class, notes, bonds, or other obligations, in payment or exchange for any stock or interest therein, or any notes, bonds, or other securities or contracts of any character; the purchase, ownership, and operation of real estate, improved or unimproved, etc.

II. The organization of the plaintiff corporation was prompted by the desire of the owners of the corporate stocks of the Peoples Outfitting Company, a corporation of the State of Pennsylvania, with offices at Wilkes-Barre, Pennsylvania; the Colonial Furniture Company, a corporation of the State of Ohio, with offices at Cleveland, Ohio; the Peoples Outfitting Company, a corporation of the State of Indiana, with offices at Indianapolis, Indiana; the Household Outfitting Company, a corporation of the State of New York, with offices at Syracuse, New York; the Peoples Outfitting Company, Inc., a corporation of the State of Ohio, with offices at Springfield, Ohio; and the Household Outfitting Company, a corporation in the State of Pennsylvania, with offices at Scranton, Pennsylvania; to perpetuate the management of the business of the said corporations, all of which were engaged in the dealing or trading in furniture and household furnishings at retail, in the families of the said stockholders. With the exception of a small stock interest in one of the corporations, all of the corporate stock of those corporations was owned by individuals, who were related to each other, either by blood or by marriage.

III. The first meeting of the incorporators and subscribers to the stock of the plaintiff corporation was held on the second day of June, 1925, at Wilmington, Delaware. At that meeting by-laws for the regulation of the affairs of the corporation were adopted; a board of nine directors was nominated and elected; the board of directors was authorized, in their discretion, to issue the capital stock of the

corporation to the full amount or number of shares authorized by the certificate of incorporation, in such amounts and for such considerations as from time to time should be determined by the board and as might be permitted by law. The secretary presented transfers of subscriptions from the original incorporators and subscribers for the shares of stock held by them, which transfers were upon motion approved.

IV. The first meeting of the board of directors of the plaintiff corporation was held in the city of New York on the 15th day of June, 1925. The board of directors was comprised entirely of former stockholders in the six subsidiary corporations. At that meeting forms of certificates for the securities of the corporation were approved; officers of the corporation were elected; it was ordered that the treasurer furnish a surety bond of $50,000; the secretary presented an oath for the faithful performance of his duties; the assignments by the original subscribers to the plaintiff's certificate of incorporation of their several subscriptions to the stock of the plaintiff were accepted; a seal was adopted as the corporate seal of the corporation; the secretary was authorized and directed to procure proper corporate books; the treasurer was authorized to open a bank account on behalf of the corporation; the bank was authorized to make payments from the funds of the corporation on deposit with it, upon and according to the check of the corporation, signed by its president or secretary; the treasurer was authorized to open bank accounts on behalf of the corporation in such banks and trust companies as should be designated from time to time by the president and treasurer; the banks or trust companies were authorized to make payment from the funds of the corporation on deposit with them upon and according to the check of the corporation, signed by its treasurer and countersigned by its president or secretary; the treasurer was authorized to pay all fees and expenses incident and necessary to the organization of the corporation; the treasurer, with the countersignature of the president or secretary, was authorized to sign all bank paper (other than checks) and all notes and bills of exchange for and on behalf of the corporation; the Corporation Trust Company of America was appointed agent of the corporation in charge

of the principal office in Delaware and of the books required by the law to be kept in that office, and the agent upon whom process against the corporation might be served in accordance with the laws of Delaware; the Corporation Trust Company of America was authorized to act upon instructions of designated counsel in respect to any questions in connection with the said agency; the secretary was authorized to sign and seal with the corporation seal a certificate of authorization to said trust company; the chairman advised the board that the several owners of all of the capital stocks and securities of the several corporations named in Finding II hereof had offered to exchange the stock and securities owned by them for the stock of the plaintiff corporation and that the said stockholders had offered to enter into an organization agreement with each other and with the plaintiff corporation; the offers of said stockholders to transfer all of the capital stocks and all of the securities of the several corporations mentioned in the organization contract in exchange for stock of the plaintiff corporation were accepted; the officers of the corporation were authorized, upon receipt by the corporation from said stockholders of their certificates for said stock and said securities duly indorsed in blank, to issue to said stockholders temporary receipts and, as soon as stock certificates were secured, to issue, upon surrender of said receipts, permanent certificates for stock of the plaintiff corporation; the president of the corporation was authorized and directed to enter into an organization contract with the stockholders; the secretary was authorized and directed to affix the seal of said corporation to said contract; the president or either of the vice presidents was authorized and directed to execute contracts on behalf of the corporation providing for the employment of managers and associate managers of the corporation's several stores for the period from June 15, 1925, to December 31, 1929, the annual salary of each such employee to be paid to the employee by such subsidiary of the employer as should be designated from time to time by the employer, and the directors of the corporation appointed and designated said individuals to positions at the said stores; and the treasurer was authorized and directed to pay from the funds of the

corporation all of the expenses incident to the organization of a voting trust. The stock of the plaintiff was issued to the former stockholders of the subsidiaries in proportion to their holdings in those subsidiaries and the worth of securities of the subsidiaries held by them.

V. On August 23, 1925, the second meeting of the board of directors of the Associated Furniture Corporation was held at Cleveland, Ohio. The president advised the board that on July 18, 1925, he had rented a safe-deposit box for the use of the corporation, and the action of the president and secretary in renting the said safe-deposit box was ratified and approved. The chairman of the board read the written offers of two individuals to sell to the corporation certain of its securities; whereupon a resolution providing for the acceptance of the said offers was adopted and the secretary was authorized and directed to notify them of the said acceptance, and the treasurer was authorized and directed to pay the aggregate sum of $464,664.34 to said individuals, upon receipt of the certificates representing their stock and other security holdings in the corporation. Resolutions providing for the payments of dividends were adopted and the executive committee of the corporation was authorized to borrow not to exceed $350,000.00 for the account of the corporation.

VI. The third meeting of the board of directors of the corporation was held at Cleveland, Ohio, February 15, 1926. At that meeting quarterly annual dividends were declared and ordered paid.

VII. The second annual meeting of the stockholders of the corporation was held at Cleveland, Ohio, on the twelfth day of April, 1926. At that meeting directors were duly elected; certain provisions of the corporation's by-laws were amended; and the board of directors and other proper officers of the corporation were authorized and directed to take all such steps as might be necessary for the redemption and retirement of certain stock, as required by the by-laws of the corporation.

VIII. The fourth meeting of the board of directors of the corporation was held at Cleveland, Ohio, on April 12, 1926, following the second annual meeting of stockholders.

Officers of the corporation were elected. It was ordered that the treasurer furnish a surety bond of $50,000 conditioned upon the faithful performance of his duties, and quarterly annual dividends were declared and ordered paid.

IX. Subsequently to June 30th, 1925, the plaintiff exercised the right which it had to vote the stock which it held in its several subsidiaries, and elected the members of the boards of directors of those companies. The personnel of the directorates of those companies were interchanged from time to time in order that each of the subsidiary stores might have the benefit of the policies pursued and the methods used by the others. All matters incident to the actual operation of the businesses of the subsidiaries, including the purchase of merchandise, the engagement of employees, other than store managers and associate managers, were left to the discretion of their individual managements and directors. The plaintiff neither loaned money to its subsidiaries nor discounted their notes, nor procured credit for them through dealers. It required only that the subsidiaries furnish monthly trial balance statements to the chairman of the plaintiff's finance committee. He, when in his opinion the cash balances of the subsidiaries as indicated by their monthly statements would permit of it, or when he was so authorized by resolutions of the boards of directors, drew upon the companies for funds which when received were used either to liquidate the plaintiff's bank obligation of $350,000, hereinbefore referred to as having been incurred in the acquisition of certain of its own securities, or for dividend disbursements. The plaintiff maintained no general corporate offices. Its statutory office in the city of Wilmington was in that of its agent, the Corporation Trust Company of America. It employed no clerks or other office employees. It paid neither salaries nor directors' fees to its officers and directors. Each of its officers and directors occupied an executive position in one of the subsidiaries, and received his compensation from the company with whose management he was directly concerned. The plaintiff's sole corporate expenses subsequent to the expenses incurred in its organization were those incident to the making of its annual audit.

X. On July 31, 1925, the plaintiff filed a capital stock tax return on the form designated by the Commissioner of Internal Revenue with the collector of internal revenue at Wilmington, Delaware, and claimed thereon exemption from tax on the ground that it was not engaged in business during the year ended June 30, 1925.

XI. Thereafter, prior to May 25, 1927, the Commissioner of Internal Revenue determined that the net fair value of the capital stock of the plaintiff was $4,094,147 and made an assessment of $4,089.00 against the plaintiff, under section 700 of the revenue act of 1924, as and for a special excise tax with respect to carrying on or doing business for the period from June 2, 1925, to June 30, 1925. The said tax of $4,089.00 was based upon the value as determined by the commissioner of the capital stock of the plaintiff during the date of the issuance of said stock and June 30, 1925.

On June 7, 1927, the plaintiff paid the tax so assessed to the collector of internal revenue at Wilmington, Delaware; and on or about December 16, 1927, a claim for refund of that amount was filed with the collector of internal revenue at Wilmington, Delaware. Thereafter, and on February 27, 1928, the Commissioner of Internal Revenue rejected the said claim in the entirety.

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

This is a suit to recover the sum of $4,089.00, with interest, which amount was on July 10, 1927, paid by the plaintiff to the collector of internal revenue at Wilmington, Delaware, as a special excise tax with respect to the carrying on or doing business for the fiscal year beginning July 1, 1925.

The challenged tax was assessed and collected under authority of section 700 of the revenue act of 1924 (43 Stat. 325), the relevant part of which reads as follows:

"(a) On and after July 1, 1924, in lieu of the tax imposed by section 1000 of the Revenue Act of 1921—

"(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year end-

ing June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included * * *"

The purpose of the organization and incorporation of the plaintiff was to do the following things:

"The manufacturing, buying, and selling, or otherwise dealing or trading in furniture, fixtures, furnishings, and other kinds of goods, wares, and merchandise; the acquisition of the good will, business, stock, assets, etc., of any person, firm, or association, or corporation doing business of a character similar to that of the plaintiff; the acquisition, ownership, and disposal of the shares of stock or voting trust certificates, participation certificates, or other certificates issued in respect of the shares of stock of any class of other corporations or associations; the issuance of its own stock of any class, notes, bonds, or other obligations in payment or exchange for any stock or interest therein, or any notes, bonds, or other securities or contracts of any character; the purchase, ownership, and operation of real estate, improved or unimproved, etc."

It is not contended that the plaintiff was not engaged in carrying on or doing business during the fiscal year beginning July 1, 1925, and ending July 30, 1926, but that it was not so engaged during the preceding year ending June 30, 1925.

It is contended that plaintiff's activities between its incorporation, June 2, 1925, and July 1, 1925, were confined to its organization meeting on June 2nd and the meeting of its board of directors on June 15th, and that nothing was done at these meetings other than such routine acts as were necessary to the completing of its corporation organization.

If the plaintiff prior to July 1, 1925, did nothing further than perform such acts as were necessary to complete its corporate organization, it is not subject to the tax imposed for the year beginning July 1, 1925, as subsection (b) of section 700 of the 1924 act provides:

"The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business during the preceding year ending June 30, * * *."

It is not required that a corporation, in order to be liable for the tax, should have been engaged in business the whole

of the preceding year, article 28, of Regulations No. 64, providing:

"* * * If it was in business even one day of the preceding year and one day of the taxable year it is subject to the tax."

The regulations (article 12) further provide:

"* * * No particular amount of business is required to bring a company within the terms of the act."

The decided cases also lay down the same rule. *Morrisdale Land Company* v. *United States*, 66 C. Cls. 701; *Edgar Estates Corporation* v. *United States*, 65 C. Cls. 415; *Chevrolet Motor Company* v. *United States*, 64 C. Cls. 211.

The various activities of the plaintiff are stated in detail in the findings of fact, and it is not necessary to repeat them here. Findings III and IV have to do with the activities of the plaintiff prior to July 1, 1925, and Findings V and X, with its transactions and acts subsequent to that date.

Plaintiff's activities subsequent to July 1, 1925, are material only in so far as they may be related to, or are component parts of its activities during the preceding year, and throw light on whether or not such activities constitute the carrying on or doing business.

Do the acts performed by the plaintiff between the date of its incorporation June 2, 1925, to July 1, 1925, constitute the carrying on or doing business, or were they as the plaintiff contends, nothing more than formal routine acts necessary to the completing of its corporate organization?

Article 12 of the regulations provides:

"A corporation may complete its organization and sell its capital stock for cash without incurring liability, but other activities, such as entering into contracts for the purchase of property or construction of a plant are corporate business acts, and constitute doing business. In other words, it is not necessary that the company be actually engaged in the manufacture of its intended product or that it be actually creating profit or gain to incur liability. The *making of contracts*, buying of materials or machinery, constructing buildings, *employing and discharging of individuals*, are necessary business acts leading to the more profitable end of manufacturing certain products." (Italics ours.)

Opinion of the Court

The plaintiff performed all necessary acts to complete its corporate organization, and did complete such organization prior to July 1, 1925. We think the plaintiff, also, between the date of its incorporation and July 1, 1925, engaged in other activities than such as were necessary to complete its organization, and that those activities constitute doing business within the meaning of the statute.

The purposes of the plaintiff's organization as stated in its certificate of incorporation include the "manufacturing, buying, and selling or otherwise dealing or trading in furniture, fixtures, furnishings, and other kinds of goods, wares, and merchandise; and the acquisistion of the good will, business, stock, assets, etc., of any person, firm, or association, or corporation, doing business of a similar character, * * * and the issuance of its own or other obligations in payment or exchange for any stock or interest therein * * *."

In pursuance of the purposes of its organization the plaintiff, by formal act of its directors, on June 15, 1925, acquired all the capital stock of six corporations engaged in business similar to that for the carrying on of which the plaintiff was organized, and issued its own stock in payment therefor. The plaintiff did not acquire the stock of these corporations as an investment. Its acquisition constitutes the carrying on or doing business. *Orpheum Circuit, Inc.*, v. *Reinecke*, 41 Fed. (2d) 524.

The plaintiff's board of directors on June 15, 1925, authorized and directed its officers to execute contracts on its behalf for the employment of managers and associate managers for its various stores for the period from June 15, 1925, to December 31, 1928. These contracts were duly executed, and managers and associate managers were, as of that date, designated for all the stores, the stock of which had been acquired by the plaintiff.

The execution of these contracts and the employment of managers and assistant managers for its various stores were acts necessary to enable the plaintiff to carry out the purposes of its organization, and fall squarely within the terms of the regulations that "the making of contracts and the

employment and discharging of individuals are necessary business acts. * * * "

The activities of the plaintiff above stated, the acquisition of the stock of various corporations, the making and entering into contracts with individuals as managers and associate managers of its stores from June 15, 1925, all of which acts were performed between the date of the plaintiff's incorporation, June 2, 1925, and July 1, 1925, were not formal routine acts necessary to the completion of the plaintiff's corporate organization. They were acts which constitute the carrying on or doing business.

The plaintiff makes the further contention, that should it be held that the plaintiff was engaged in business during the preceding year ending June 30, 1925, the tax for the fiscal year beginning July 1, 1925, should be based on the fair average value of such stock for such preceding year, and that since the plaintiff was engaged in business for only a portion of that year, the fair average value of its stock would be that proportion which the number of days in which it was engaged in business bears to the total number of days in the fiscal year ended June 30, 1925. In support of this proposition *One Liberty Street Realty & Securities Corporation* v. *Bowers*, 8 Fed. (2d) 278, is cited. In that case the taxpayer had during the preceding year issued additional stock, and the court held that the tax was improperly based on the value of the capital stock at the end of the year, but that it should be based upon the average value for the year.

In the instant case the plaintiff's capital stock was not increased, but remained the same throughout the time it was engaged in business during the preceding year ended June 30, 1925. There being no change whatever in the value of the plaintiff's capital stock during the year, the provision of the statute that the tax be based on the " fair average value " is not applicable.

This question was presented in *Alaska Consolidated Canneries, Inc.*, v. *United States*, 66 C. Cls. 713. The court said:

" In the present case the corporation was in existence only for the month of June in the year preceding the taxable

period. There was no change whatever in the value of the stock from June 1 to June 30, 1925. Where there is no change in value, there is no occasion for determining the 'fair average value.' It is only in case of an increase or a decrease in value that the term used in the statute, 'fair average value,' has any importance."

It is the opinion of the court that plaintiff was carrying on or doing business during the fiscal year beginning July 1, 1925, within the meaning of section 700, of the revenue act of 1924, and that it was also engaged in business during the preceding year ending June 30, 1925. The taxes plaintiff seeks to recover were legally assessed and collected, and the claim for refund was properly rejected by the Commissioner of Internal Revenue.

Plaintiff's petition is dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear and took no part in the decision of this case.

ALPHA PORTLAND CEMENT CO. v. THE UNITED STATES

[No. F-319. Decided October 20, 1930]

On the Proofs

Profits tax; consolidated group; purchase of subsidiary's stock; transfer of assets for indebtedness; ad interim loss.—Plaintiff purchased the entire capital stock of another company, and subsequently, in 1917, received therefrom all its assets in return for indebtedness, thereby wiping out the indebtedness. *Held*, that a loss sustained by the subsidiary between the time its stock was so purchased and the time its assets were transferred was not an intercompany loss, and was deductible in the excess-profits tax return of 1917 income for the consolidated group of which the two were members.

The Reporter's statement of the case:

Mr. F. Carroll Taylor for the plaintiff. *Mr. Louis H. Porter* was on the briefs.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Ottamar Hamele* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff, a New Jersey corporation, is engaged in the manufacture of portland cement at its several mills in various parts of the country. It was organized in 1910 through a consolidation of other corporations.

II. In 1909 one of the plaintiff's predecessors had acquired all of the capital stock of the Catskill Cement Company, a New Jersey corporation, for $416,627.27, and in the consolidation of 1910 this stock was acquired by the plaintiff.

The Catskill Cement Company, hereinafter referred to as the Catskill Company, was then engaged in the manufacture of portland cement at Catskill, New York. From 1910 to 1912 the Catskill Company operated its mill as a separate corporation, although plaintiff owned its entire capital stock. In 1912 the plaintiff, through a lease reduced to writing in 1914, took over the operation of the Catskill mill. Under the terms of this lease plaintiff agreed to pay the Catskill Company a royalty of 2 cents a barrel on all cement made or manufactured during its term; the interest on the issue of mortgaged bonds of the Catskill Company and the interest upon any renewal or replacement thereof; and to pay all taxes, duties, and assessments upon the leased premises. No cash was actually paid by plaintiff to the Catskill Company under this lease. All expenses of operation of the Catskill plant were borne by plaintiff under the lease. All monies necessary for improvements and additions thereto were advanced by plaintiff to the Catskill Company and were expended by plaintiff on behalf of the Catskill Company in making such additions and improvements, and were charged by plaintiff on its books against the Catskill Company. The amounts so expended were carried on plaintiff's books as accounts receivable.

III. When the plaintiff on organization in 1910 came into ownership of the entire capital stock of the Catskill Company, it found the facilities of the latter company in bad

condition. Among other things, the plant furnishing power for the mill was inadequate.

During the years 1910 to 1914 the plaintiff advanced to the Catskill Company large sums, which were expended by the plaintiff in enlarging and improving the Catskill plant. Among other things, there was purchased, erected, and installed in the Catskill plant a complete new power plant, consisting of a gas-generating plant, seven gas engines, and the necessary housing and equipment. This new power facility was completed in 1914 at a cost of $454,696.78.

IV. During that time litigation was pending against the Catskill Company by the owners of ice fields on the Hudson River because of dust discharged from the kilns of the Catskill mill. There was at that time no practical method known for reducing such discharge. During the course of said litigation plaintiff's engineers invented a method of collecting the dust by first cooling the gases from the cement kilns by passing such gases through steam boilers. In order to meet this change of conditions, the Catskill Company and the plaintiff decided to install such waste-heat boilers and turbines, and to generate the power for the mill in this way. Construction of the waste-heat boilers was commenced late in 1915 or the early part of 1916 and was completed early in 1917 before the sale and transfer by the Catskill Company of its business and assets to plaintiff. Thereupon, the Catskill Company permanently abandoned the gas-engine plant in the operation of the mill and it was not thereafter used for any other purpose. Prior to this time the gas-engine plant had been used to furnish the power for the cement mill and was continued in full use until closed down and replaced by another method. The new power plant was completed and the gas-engine plant was abandoned prior to March 10, 1917. At the time of abandonment the gas engines and the equipment had a salvage value of $15,000. After the installation of the new power system, the abandonment of the gas-engine plant, and the sale and transfer of the assets of the Catskill Company, plaintiff made efforts to sell the gas engines and the equipment through advertisements and solicitation of secondhand dealers and manufacturers. No purchasers

could be found until 1923 and 1924, in which years these engines and equipment were sold for $15,000. The salvage value of the building constructed to house the gas-engine power plant was $24,850.60 at the time of abandonment of the gas power facilities.

V. The Commissioner of Internal Revenue allowed an annual rate of depreciation upon the Catskill Company's plant of 5 per cent.

VI. The Catskill Company owned a large plant and equipment, and considerable real estate and quarries. On March 10, 1917, the Catskill Company, by written deeds of transfer of that date, sold and transferred to plaintiff all of its business and properties for a price of $1,222,079.73, the transfer being made effective as of January 1, 1917. The Catskill Company was thereafter, on November 6, 1918, legally dissolved.

From March 10, 1917, until the date of dissolution the Catskill Company owned no assets and carried on no business of any kind. The price of $1,222,079.73, at which the Catskill Company transferred all of its properties to plaintiff, represented advancements of money from plaintiff to the Catskill Company, and expended by the Catskill Company, or by the plaintiff in its behalf for improvements and additions to the Catskill Company's plant. Apart from the capital-stock liability, the indebtedness of the Catskill Company to the plaintiff represented the sole liability of the Catskill Company. After the transfer to plaintiff the Catskill Company owned no assets and owed no debts. At the time of the transfer plaintiff credited $1,222,079.73 to the Catskill Company in full payment for all of the assets transferred. The indebtedness of the Catskill Company to the plaintiff for money advanced was thereupon satisfied and discharged. The amount of $416,627.27 which plaintiff carried on its books as the cost to it of the entire capital stock of the Catskill Company was credited to the Catskill account and charged to profit and loss on December 31, 1917.

VII. For the calendar year 1917 the plaintiff on March 29, 1918, filed a consolidated excess-profits tax return for itself, the Catskill Company, and the Alpha Portland

Cement Company of Pennsylvania. The plaintiff, the Catskill Company, and the Alpha Portland Cement Company of Pennsylvania filed separate individual tax returns for 1917 for income-tax purposes. Plaintiff paid the income and profits tax of $33,495.13 shown upon the plaintiff's separate income-tax return, and the consolidated profits tax return filed.

The income-tax return filed by the Catskill Company showed no income and no expenses during the year and contained the statement, " no income and no expenses during the year 1917." The officers of the plaintiff and the Catskill Company were the same.

VIII. The cost to the plaintiff of the stock of the Catskill Company in 1910 was $416,627.27. Its fair market value on March 1, 1913, was $365,189.61. Upon audit of the returns filed by the plaintiff for 1917 the Commissioner of Internal Revenue held that the plaintiff had sustained a loss in that year on account of its investment in the stock of the Catskill Company of $365,189.61, being the March 1, 1913, value of the stock of that company which was lower than cost. The commissioner allowed the plaintiff this amount as a deduction in determining its net income for income-tax purposes, but refused to allow the same as a deduction in determining the net income for excess-profits tax purposes.

IX. No loss was allowed specifically because of the abandonment of the gas-engine plant of the Catskill Company, although that item entered into the commissioner's determination of the amount of loss which he allowed for income-tax purposes through the investment by plaintiff in the stock of the Catskill Company.

X. The commissioner determined and assessed an additional tax of $28,352.76 which the plaintiff paid October 6, 1925. April 26, 1926, it filed claim for refund, which claim was denied by the commissioner July 22, 1926, whereupon it brought this suit to recover $20,028.90 with interest from October 6, 1925.

The court decided that plaintiff was entitled to recover, with interest.

LITTLETON, *Judge*, delivered the opinion of the court:

The Catskill Cement Company was affiliated with plaintiff and a consolidated profits tax return for 1917 was filed for this and other affiliated corporations.

The facts establish that the gas engine plant, including the building in which it was housed, was installed and constructed in 1914 at a cost to the Catskill Company of $454,696.78. It was abandoned and its use discarded early in 1917 before the sale and transfer by the Catskill Company of its entire business and assets to the plaintiff on March 10, 1917. The building, which was included in the aforementioned cost, had a fair market value of $24,850.60 at the time the gas power plant was abandoned and the gas engines and equipment had a salvage value at the time of the abandonment of $15,000. Therefore, upon the abandonment of the gas power plant the Catskill Company sustained a loss of the difference between the original cost, less depreciation of 5 per cent for two years on the gas engines and equipment, and the salvage value, or $369,376.51. This loss was in no sense intercompany and was therefore a proper deduction in determining the consolidated net income of the group for excess-profits tax purposes.

The fact that the power plant was erected and installed by the plaintiff which owned all the stock of the Catskill Company did not change the situation since, at that time, the corporations were separate entities and the amount expended in construction and installation of the power plant was an expenditure by the Catskill Company. The fact that it borrowed the money from the plaintiff does not change the situation. Legal ownership of all of the assets of the Catskill Company was in that company until the sale and transfer on March 10, 1917. The fact that the deeds recite that the transfer was effective as of January 1, 1917, is of no significance in connection with the question involved. The Catskill Company was not dissolved until November, 1918.

The above deduction, which we hold was allowable from the consolidated net income for excess-profits tax purposes, results in no excess-profits tax liability. The plaintiff is,

therefore, entitled to recover and judgment in its favor for $20,028.90, with interest, will be entered. It is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear and took no part in the decision of this case.

JOHN E. JOHNSON v. THE UNITED STATES

LOUIS W. WITRY v. SAME

[Nos. F-183 and F-184. Decided October 20, 1930]

On the Proofs

Income tax; valuation of stock as of March 1, 1913; use of mathematical formulæ.—Where the value of shares of stock on a certain date is in issue the application of mathematical formulæ to determine the same is of doubtful value.

Same; reasonableness of valuation by Commissioner of Internal Revenue.—The facts reviewed and *held*, that the valuation placed upon stock held by plaintiffs as of March 1, 1913, in determining the profit made on sale thereof for income-tax purposes, by the Commissioner of Internal Revenue, was not below market value.

The Reporter's statement of the case:

Mr. F. W. McReynolds for the several plaintiffs.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney Charles B. Rugg*, for the defendant.

The court made special findings of fact, as follows:

I. From and before March 1, 1913, until the sale thereof in 1918, plaintiff John E. Johnson owned 2,296 shares, and plaintiff Louis W. Witry owned 1,224 shares out of a total of 8,000 shares of the common stock then outstanding, of the Waterloo Gasoline Engine Company, a corporation doing business at Waterloo, Iowa. In the year 1918 the said 8,000 shares, including those owned by the plaintiffs John-

son and Witry, were sold for $250 per share, or a total of $2,000,000.

II. Each of the plaintiffs filed his income-tax return for the year 1918, and in so doing each computed profits upon the sale of his stock in the Waterloo Gasoline Engine Company. based upon a value of $200 a share on March 1, 1913, and accordingly paid an income tax upon a profit of $50.00 a share, for each share of stock sold by him.

III. The Commissioner of Internal Revenue refused to accept the March 1, 1913 value placed upon said stock by the plaintiffs, and determined the value of said 8,000 shares of common stock to be $1,441,852.48, or $180.23 per share, on March 1, 1913, and the total profit on the sale of the 8,000 shares to be $558,147.52. Of this sum $160,188.34 was allocated to plaintiff John E. Johnson and $85,396.57 was allocated to plaintiff Louis W. Witry, the March 1, 1913 value of the stock being greater than cost. Based upon this finding, the commissioner assessed and collected additional income taxes in April, 1924, for the year 1918 of $29,010.62 from plaintiff Johnson and $13,068.73 from plaintiff Witry. Said additional taxes were duly paid by plaintiff Johnson on April 17, 1924, and by plaintiff Witry on April 5, 1924; in addition, plaintiff Witry paid $999.75 interest due to failure to pay said additional tax upon the date demanded by the commissioner.

IV. Both plaintiffs duly filed claims for refunds of the entire additional amounts respectively paid, as shown by the preceding finding, and both of these claims were rejected by the commissioner on March 25, 1926. These suits were filed on June 7, 1926.

V. From 1908 to 1913, inclusive, the said company was engaged in the manufacture of gasoline engines. In the latter part of this period it made some tractors in an experimental way and sold them in the same manner, being responsible for their performance. Some other machinery was manufactured in a small way but not profitably. The following table shows the course of business during this period:

Opinion of the Court

Year	Number of gasoline engines	Gross sales in dollars	Net earnings in dollars	Percentage of net profit to gross sales (computed)
1908	1,480	$218,799.16	$45,958.39	21.01
1909	5,111	435,622.10	96,329.04	22.11
1910	8,768	747,864.56	134,396.17	17.97
1911 [1]	15,957	646,146.69	121,129.02	18.75
1912	22,996	1,041,794.20	84,695.32	8.13
1913	25,228	1,241,005.69	132,429.56	10.67

[1] 9 months, Jan. 1, 1911, to Sept. 30, 1911.

Thereafter, the number of engines sold showed a gradual decrease, while the number of tractors sold rapidly increased. The following table shows the number of engines and tractors sold during the periods named therein.

Engines sold Year ending Sept. 30—		*Tractors sold* Year ending Sept. 30—	
1914	22,001	1914	53
1915	20,454	1915	677
1916	11,165	1916	2,565
1917	8,587	1917	4,007
1918 [1]	8,626	1918 [1]	[2] 5,634

[1] 13 months to Oct. 31, 1918.
[2] At Mar. 14, 1918, the company had advance orders for 3,200 tractors, and a deposit of $100 per tractor with such orders.

VI. The net income of the company for 1912 was $84,-695.32. There was outstanding at that time preferred stock to the amount of at least $77,900. The common stock of the Waterloo Gasoline Engine Company on March 1, 1913, did not have a market value in excess of the amount fixed by the commissioner, as shown in Finding III to be $180.23.

The court decided that neither plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

These two suits have been begun by the plaintiffs therein to recover alleged overpayments of income taxes respectively made by each of the plaintiffs for the year 1918, proper claims for refund having been filed and by agreement of parties are submitted together.

The sole issue in both cases is whether the commissioner correctly fixed the value in 1913 of certain corporation stock

which the plaintiffs sold in 1918, the stock being sold at a profit upon which each plaintiff was taxed. The claim of the plaintiff in each case is that the commissioner understated the 1913 value, thereby increasing the profit to be taxed and the amount of his tax in the sum for which he brings suit. The question in the case is wholly one of fact, and within the reasonable limits of an opinion it is not possible for the court to set out all of the matters which lead to the conclusion that the decision of the commissioner should be affirmed. There are, however, certain features of the case to which attention should be called which to a considerable extent have influenced our conclusion in the case.

Letters were addressed by the Commissioner of Internal Revenue to each of the plaintiffs showing the method by which the amount of additional tax assessed against each was obtained. From these letters it appears that the value of the stock of the corporation was ascertained by the application of a mathematical formula to certain facts in the case, which are not necessary to be set out here. Counsel for plaintiffs contends that this method was erroneous. The ultimate question in the case is not whether the commissioner pursued the correct method for ascertaining the value of the stock, but whether the value which he placed upon the stock is correct. It is not necessary for us to determine whether there are any cases in which the value of stock can be ascertained solely by the application of a mathematical formula, but we think in most cases it can not. We are quite clear that in the two cases before the court there are other matters more important than the results which can be reached through the application of an arithmetical calculation, and we do not think it necessary to apply any such formula in order to determine the case.

The testimony shows that prior to 1913 practically all of the business of the company had been in the manufacture of gasoline engines, and that while this business had been successful and the amount thereof had been increasing from year to year the percentage of net profits to gross sales commenced to fall off in 1910, and in 1912 was less than half of

what it was in 1910. The net earnings in 1910 show a large increase over 1909 because a much larger volume of business was done, but in 1912 the net earnings were more than one-third less than they had been in 1910. It is quite true that from 1912 to the time when the sale was made of the stock in 1918 the profits of the company increased, and very rapidly increased, during the latter part of this period. The reason for this was that the company had made a striking success of a tractor which had been in the experimental stages in 1912 and 1913. From the manufacture of the tractors large profits were derived, although the sales of the gasoline engine fell off and it became only a minor part of the business of the company. A person considering buying stock in the company might have thought it likely that the sales of the engine would fall off but he could not foresee the remarkable success of the tractor.

It is a matter of common knowledge that the market value of shares of stock, in the absence of something that tends strongly to show that the future will bring a change in the profits of the company, is largely determined by the earnings of the company in the previous year. The Waterloo Gasoline Engine Company's stock had no established market value on March 1, 1913, but a person who was considering the advisability of purchasing its stock would under the circumstances be largely influenced by the decline in the profits of the company for the year 1912. There was then nothing to indicate that this decline in profits would not continue, as in fact it did with reference to the manufacture of gasoline engines, which, as already has been stated, constituted nearly all of the business which had been done up to that time. There was nothing to indicate at that time that the manufacture of the tractor would become a profitable, and, as it subsequently turned out, a highly successful business while the manufacture of the gasoline engine alone declined. Up to March 1, 1913, the tractors were still in the experimental stage, and while a small number of tractors were sold, they were sold as experimental machines for

which the company was responsible. The "Model N" tractor, which finally proved so successful, was not marketed in the ordinary manner, if at all, until 1914. The European war greatly increased the demand for tractors generally, but none of this could be foreseen on March 1, 1913.

Another fact might be specially noted. The net income for 1912 was $84,695.32. There was outstanding at that time preferred stock to the amount of at least $77,900. The rate of dividend on this preferred stock is not stated, but it is fair to assume that it was not less than $6.00 per share and was probably considerably more. At that rate there was only about $80,000 earned which could be applied as dividends on the common stock that year, or on 8,000 shares of common stock the net earnings were practically $10.00 per share. At the valuation of $180.23 per share fixed by the commissioner, the common stock earned only 5½ per cent on the valuation. At $200 per share, the price which was fixed on the stock in the returns, the amount earned would be less than 5 per cent. It is said that this low rate was partially accounted for by the expenses incurred in experiments on the new tractor, which were charged to expense and not capitalized. Granting this, these figures would have an important bearing on the market value of the stock.

The matters related above, which stand out particularly in the evidence, are only part of the facts which tend to sustain the commissioner's decision as to the value of the stock. We have carefully considered all of the evidence and reach the ultimate conclusion that the value of the stock in 1913 was not higher than that fixed by the commissioner.

It follows that in both of the cases under consideration the petition must be dismissed, and it is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear and took no part in the decision of this case.

WILLIAM M. STEWART v. THE UNITED STATES

[No. H-130. Decided October 20, 1930]

On the Proofs

Rental allowances, Army; duty with Army of Occupation; temporary station.—An officer of the Army on duty at Coblenz, Germany, with the Army of Occupation in 1922 and 1923, was on field duty and not at a permanent station, and was entitled to rental allowances for his dependents accordingly.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *Mr. John W. Gaskins* and *King & King* were on the briefs.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney Charges B. Rugg*, for the defendant.

The court made special findings of fact, as follows:

I. During the period from July 1, 1922, to February 7, 1926, plaintiff was a duly commissioned officer in the Regular Army of the United States holding the rank of captain up to November 18, 1922, at which time he was demoted in that rank and was immediately commissioned as a first lieutenant.

II. On July 1, 1922, plaintiff was on duty at Coblenz, Germany, with the Army of Occupation in that country, and was furnished a room in a hotel provided by the German Government which was only sufficient for his personal use. Subsequently his regiment left Coblenz and returned to the United States on February 8, 1923.

III. During the period aforesaid plaintiff had two minor children, Janet Elizabeth Stewart, at that time 11 years of age, and Allan Victor Stewart, then 8 years of age, who were actually and necessarily dependent upon him for support and whom he did support, furnishing them suitable quarters with his mother at Benicia, California. Plaintiff sent to his mother $115 each month by way of allotment of salary for their room, lodging, food, clothes, and maintenance. Plaintiff's children have no other means of support.

IV. Plaintiff actually received rental allowance for four rooms at $20 a month each, totaling $80, for the month of July, 1922, but the same was required to be refunded by way of checking against his salary. If plaintiff is entitled to rental allowance as an officer with dependents from July 1, 1922, to January 7, 1923, he is entitled to recover $498.66.

The court decided that plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The act of June 10, 1922, 42 Stat. 628, provides as follows:

"Each commissioned officer on the active list * * * in any of the services mentioned in the title of this act, if public quarters are not available, shall be entitled *at all times*, in addition to his pay, to a money allowance for rental of quarters, the amount of such allowance to be determined by the rate for one room * * *. Such rate for one room is hereby fixed at $20.00 per month for the fiscal year 1923. * * * *The rental allowance shall accrue while the officer is on field or sea duty*, temporary duty away from his permanent station, in hospital, on leave of absence or on sick leave, *regardless of any shelter that may be furnished him for his personal use*, if his dependent or dependents are not occupying public quarters during such period." (Italics ours.)

The act of May 31, 1924, 43 Stat. 250, amending the act of June 10, 1922, above quoted, provides as follows:

"* * * Each commissioned officer below the grade of brigadier general or its equivalent * * * while either on active duty or entitled to active duty pay shall be entitled at all times to a money allowance for rental of quarters. The amount of such money allowance for the rental of quarters shall be determined by the rate for one room * * *. Such rate for one room is hereby fixed at $20 per month for the fiscal year 1923 * * *.

"To an officer having a dependent, * * * receiving the base pay of the third period the amount of this allowance shall be equal to that for four rooms. * * *

"No rental allowance shall accrue to an officer having no dependents, while he is on field or sea duty, nor while an officer with or without dependents is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank or a less number of rooms in any particular case wherein, in the judgment of competent

superior authority of the service concerned, a less number of rooms would be adequate for the occupancy of the officer and his dependents."

A proviso in the above act makes the amendment retroactive to July 1, 1922.

The act of September 14, 1922, 42 Stat. 840, provides that—

"The discharge and recommission of officers in the next lower grade shall not operate to reduce the pay or allowances which they are now receiving or to deprive them of credit for service now counted for purposes of pay or retirement."

This plaintiff originally brought this question before this court on July 24, 1923, in Case No. C–913, claiming rental allowance of officer with dependents under the act of June 10, 1922. Subsequently Congress passed the act of May 31, 1924, *supra*, amending the act of June 10, 1922, and providing that each commissioned officer while on active duty or entitled to active duty pay should be entitled to a money allowance for quarters except where adequate quarters for himself and his dependents were assigned to him at his permanent station. This amendment, as shown by the report of the Committee on Military Affairs of the Sixty-eighth Congress, first session, Report No. 236, was to correct certain errors made by the General Accounting Office in refusing to make allowances for rent. Believing that the matter could be more expeditiously handled before the Comptroller General since the passage of the amendment, plaintiff, on June 19, 1924,[1] dismissed his petition without prejudice. Plaintiff's claim was then presented to the Comptroller General under the amended statute, but the comptroller disallowed the claim and gave as his reasons therefor the following:

"Had claimant been accompanied by his dependents there is no question he would have been assigned adequate quarters, controlled by the Government, for their occupancy; he was not so accompanied. His claim by implication represents that he was not assigned adequate quarters for himself and his dependents; but in practice under the act of May 31, 1924, and the regulations of the War Department,

[1] 59 C. Cls. 982.

an officer reporting at a station where adequate public quarters for himself and his dependents are available and who is not accompanied by his dependents is assigned quarters on the basis of his needs notwithstanding his dependents, and the assignment of quarters to him adequate for himself when not accompanied by his dependents in the absence of a certificate by the 'competent superior authority,' as in this case, must be treated as an assignment of public quarters adequate for the occupancy of himself and his dependents, 'if any.'"

We think this holding disregarded the intent of Congress as expressed in the act of May 31, 1924. That act specifically provides for allowance except where "an officer with or without dependents *is assigned* as quarters at his *permanent station* the number of rooms provided by law for an officer of his rank or a less number of rooms in any particular case, wherein in the judgment of competent superior authority of the service concerned, a less number of rooms would be adequate for the occupancy of officer *and his dependents*." (Italics supplied.) The act of June 10, 1922, *supra*, before it was amended, provided that rental allowances should accrue while an officer was on field duty regardless of any shelter that might be furnished the officer for his personal use if his dependents were not occupying public quarters. The act of May 31, 1924, *supra*, provided that allowances should be made except where an officer is "assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank."

Quarters sufficient for his own use were assigned to him while he was in Germany with the Army of Occupation. The question is, therefore, presented whether plaintiff while stationed at Coblenz was at a permanent station. In our opinion he was not. *Hines* v. *Mikell*, 259 Fed. 28. *Fred S. Byerly* v. *United States*, 58 C. Cls. 269. *Martin Ackerson* v. *United States*, 60 C. Cls. 918. Although during the period here in question the United States was not at war with Germany, the war having been declared at an end by a joint resolution of Congress, approved July 2, 1921, we think plaintiff was on field duty. Under the terms of the armistice, a part of the American Expeditionary Forces occupied enemy territory and the duties performed by them

in Germany as a combatant organization more nearly approach those performed by a regiment in the field than the duties of a regiment permanently garrisoned. Military forces remained in such occupation long after the war had been formally terminated and were only recently withdrawn. The purpose of having such Army of Occupation was to prevent any difficulties that might possibly arise. It was an enemy actual in the past and potential at the time of occupation that warranted action in maintaining an army of occupation in Germany. It was, in any event, purely a temporary duty and should not be regarded as a permanent station. We are of opinion, therefore, that the amendment of section 6 of the act of June 10, 1922, *supra*, by the act of May 31, 1924, *supra*, was to grant relief in situations similar to that of plaintiff; that it was not intended by Congress in cases such as this that the officer should transport his minor children to the place at which he was located; and that plaintiff's duty in Coblenz, Germany, was of such a potential hostile or combative nature as to require it to be treated as field duty.

Judgment in favor of the plaintiff for $498.66 will be entered. It is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear and took no part in the decision of this case.

EBY SHOE CO., SUCCESSOR TO HARRY EBY SHOE CO., v. THE UNITED STATES

[No. K-91. Decided October 20, 1930]

On the Proofs

Income and profits tax; affiliated corporations; consolidated return; evidence of affiliation.—Two corporations, A and B, 98% of the stock of A and 77% of the stock of B being held during the year 1920 by the same stockholders, for the year 1921 98% and 78% respectively, and during the year 1920 95% of the stock

of B and 79% of the stock of A being held by a closely related family group and during 1921 97% and 79% respectively, and which were operated during those years as one business unit with the consent of all stockholders, *held* to be affiliated within the meaning of the revenue acts of 1918 and 1921 authorizing consolidated returns of net income and invested capital.

Same; blood relationship.—Blood relationship is a factor to be taken into consideration in determining whether the shares of stock in different corporations are owned or controlled by the same interests within the meaning of the revenue acts.

The Reporter's statement of the case:

Mr. Theodore B. Benson for the plaintiff.

Mr. R. C. Williamson, with whom was *Mr. Assistant Attorney General Charles B. Rugg,* for the defendant.

The court made special findings of fact, as follows:

I. The Harry Eby Shoe Company, Incorporated, was a domestic corporation organized under the laws of the State of Pennsylvania July 9, 1914, and was at all times from such date until the date of merger and consolidation hereinafter referred to engaged in the business of manufacturing shoes and had its principal office and place of business at Ephrata, Pennsylvania. By letters patent issued by the Commonwealth of Pennsylvania, April 28, 1926, the Harry Eby Shoe Company, Incorporated, and other certain corporations were merged and consolidated into a body corporate by the name, style, and title of Eby Shoe Company, Incorporated, which said latter corporation succeeded to all the privileges, immunities, franchises, and powers of the Harry Eby Shoe Company, Incorporated.

II. The Kiddy Shoe Service, Incorporated, at all times mentioned was and is a domestic corporation organized and existing under the laws of the State of Pennsylvania, engaged in the business of jobbing and selling shoes, and having an office and principal place of business at Lititz, Pennsylvania.

III. Harry Eby Shoe Company, Incorporated, filed a return and reported no corporation income and profits taxes for the year 1920, and filed a return and reported income and

profits taxes in the amount of $9,027.59 for the year 1921, which said sum was paid to the collector of internal revenue for the first district of Pennsylvania, Philadelphia, Pennsylvania, as follows:

September 18, 1922	$2,256.90
September 22, 1922	767.13
September 25, 1922	1,878.51
October 17, 1922	1,878.51
December 16, 1922	2,246.54

IV. The Kiddy Shoe Service, Incorporated, filed returns and reported no income and profits taxes for the years 1920 and 1921.

V. The Commissioner of Internal Revenue audited and revised the returns filed by the Harry Eby Shoe Company, Incorporated, and after the review thereof demanded additional taxes in the amounts of $3,356.17 and $5,881.44 for the years 1920 and 1921, respectively, the full amounts of which said sums so demanded were paid to the said collector of internal revenue on January 5, 1927. On January 21, 1927, interest on these two additional assessments in the total amount of $438.46 was paid.

VI. The total of all the sums so paid to the said collector was thereafter turned over by him and deposited in the Treasury of the United States in the usual course of the collector's official business.

VII. During the years 1920 and 1921 Harry Eby Shoe Company, Incorporated, was engaged in manufacturing children's shoes and the Kiddy Shoe Service, Incorporated, was engaged in the distribution of shoes. Approximately 50% of the output of Harry Eby Shoe Company, Incorporated, was sold to the Kiddy Shoe Service, Incorporated. The sales were on the basis of credit at the market price at the time orders were placed.

VIII. The inventories of the two corporations were during the years 1920 and 1921 taken on the basis of cost or market whichever was lower.

IX. The voting stock in the two corporations at all times during the years 1920 and 1921 was held as follows:

	Kiddy Shoe Service		Harry Eby Co.	
	1920	1921	1920	1921
Harry E. Eby	170	255	252	507
M. S. Eby	170	255	41	82
Frank E. Eby	20	30	16	32
Elias Eby	20	30	------	------
E. N. Eby	40	60	------	------
Elizabeth Miller Eby	------	------	2	6
John N. Miller	50	50	16	32
Elam H. Risser	100	100	16	32
A. N. Wolf	------	------	8	8
Norman Badorf	170	225	13	29
John S. Badorf	60	80	------	------
Paul M. Badorf	100	110	------	------
S. Milo Herr	40	120	108	216
Elmer M. Badorf	50	105	12	24
Elizabeth Holtzhouse	5	10	------	------
H. E. Holtzhouse	5	5	------	------
	1,000	1,435	484	968

X. The officers of the Harry Eby Shoe Company, Incorporated, were: Harry E. Eby, president; Elam H. Risser, vice president; S. Milo Herr, treasurer; and Norman Badorf, secretary; and in addition to the officers mentioned, the following were directors: M. S. Eby, Frank Eby, and John M. Miller.

XI. The officers of the Kiddy Shoe Service, Incorporated, were: Harry E. Eby, president; M. S. Eby, vice president; Norman Badorf, treasurer; and Paul M. Badorf, secretary; and in addition to the officers mentioned, Elmer M. Badorf was a director.

M. S. Eby was first cousin to Harry E. Eby and was employed by Harry Eby Company, Incorporated.

Frank E. Eby is a brother of Harry E. Eby.

Elias Eby is a brother of Harry E. Eby.

E. N. Eby is the father of Harry E., Frank E., and Elias Eby, and was during the years in question not employed or actively engaged in business.

Elizabeth Miller Eby is the wife of Harry E. Eby and the sister of John M. Miller.

John M. Miller's wife is a sister of the Eby brothers, and Norman, Paul M., and Elmer M. Badorf are his first cousins.

Elam H. Risser is a brother-in-law to Harry E., Frank E., and Elias Eby, having married their sister.

A. N. Wolf was engaged in an independent business in his own name and was a stockholder in the said Eby Shoe Company.

Norman Badorf was treasurer and manager of Kiddy Shoe Service, Incorporated.

John S. Badorf was the father of Norman, Paul M., and Elmer Badorf and was not actively engaged in business nor employed during the years in question.

Paul M. Badorf was employed as salesman by Harry Eby Company, Incorporated, and Kiddy Shoe Service, Incorporated. His duties required him to travel as salesman for the two corporations.

S. Milo Herr was employed by Harry Eby Company as manager.

Elmer M. Badorf was employed by Harry Eby Company as factory superintendent.

Elizabeth Holtzhouse was personal secretary to Harry E. Eby, and H. E. Holtzhouse is her father.

There has never been a minority stockholder who did not acquiesce in the management of the companies. At times stockholders have given proxies to the secretaries of the respective companies to vote their stock.

XII. During the years 1920 and 1921 Harry Eby Company sold shoes to Kiddy Shoe Service on orders placed by the latter at the market price at the time placed.

XIII. It was the practice of the two companies that whenever the Harry Eby Company needed orders to keep its output on an even keel it asked the Kiddy Shoe Service to place orders. It customarily took the Harry Eby Company from four to eight weeks to fill orders placed by Kiddy Shoe Service.

XIV. During the years 1920 and 1921 the trend of the market was downward. This began in the latter part of 1919 and continued three or four years.

XV. Prices of materials taken from the files of the Harry Eby Company disclosed that at December 22, 1919, the cost of special mahogany sides was 54 cents a foot, at June 4, 1920, it was 50 cents a foot, and during June of 1921 it was 19½ cents a foot; the price of patent leather at December 5, 1919, was 71 cents a foot, at December 9, 1920, it was 40

cents a foot, and at January 28, 1921, it was 34 cents a foot; in May, 1920, the price of misses' soles was 42 cents a pair, and the same grade was purchased in 1921 for 25 cents a pair; in 1919 sole leather, No. 1 grade, was purchased for 75 cents a foot, and in April, 1920, for 58 cents a foot; black kid was purchased in April, 1920, at 70 cents a foot, and in November, 1921, at 30 cents a foot; mat kid, used for topping, was purchased in June, 1920, at 48 cents a foot, in November, 1920, at 30 cents a foot, and in September, 1921, at 18 cents a foot; the invoices from which the above prices were quoted were taken at random of the files of Harry Eby Shoe Company.

XVI. The leathers mentioned in the above finding represent about 90 per cent of the materials in shoes that were made by the Harry Eby Company and sold to the Kiddy Shoe Service during the years in question and they consist of sole leather, patent leather, side leather, and mat topping.

XVII. On November 23, 1921, the Harry Eby Company allowed the Kiddy Shoe Service a special discount in the amount of $7,500.00. This was in addition to the regular discount. With reference to this the witness made the following explanation:

"We made a special discount of an item of $7,500.00 to help them out on shoes which they purchased, the market having fallen before they received them; before we even had the shoes made they were worth considerably less than they paid for them, so we made them an allowance to help them merchandise them without taking too great a loss. There were several other allowances made them, amounting to, I think, $6,000.00, which was made for the same purpose. I knew that they would have to take less for their shoes than they paid for them when they were delivered."

XVIII. On the $7,500.00 item the Kiddy Shoe Service was allowed the regular discount. On the day that the special discount was allowed the Kiddy Shoe Service paid Harry Eby Company the sum of $6,236.50 and, by the allowance of the special discount and the regular discount, reduced accounts receivable by about $15,251.38.

XIX. On July 1, 1921, and again on December 29, 1921, Kiddy Shoe Service was given credit by Harry Eby Company for $3,000.00, making a total of $6,000.00 credited

during the year. With reference to this transaction the witness gave the following explanation:

"This was done in order to help them out further on account of their paying more than the market price for their shoes at that time due to the fact that the leather market broke so fast. * * * I knew that they would have to take a loss on the shoes when they were shipped because I remember one lot of leather I looked at one week at 60 cents and the following week it was 40 cents."

XX. The Harry Eby Shoe Company received no consideration for the adjustments in the amounts of $7,500.00 and $6,000.00. During the month of January, 1922, Harry Eby Shoe Company accepted in payment of invoices of goods shipped to Kiddy Shoe Service from November 3, 1921, to January 7, 1922, 435 shares of the capital stock of the Kiddy Shoe Service of the par value of $43,500.00, and in addition thereto allowed Kiddy Shoe Service discounts in the amount of $5,106.98.

XXI. During the years 1920 and 1921 goods were sold by Harry Eby Company to Kiddy Shoe Service and trade acceptances were taken in payment. At December 31, 1920, these trade acceptances amounted to $56,666.08 and at December 31, 1921, to $46,962.97.

XXII. The accounts payable of the Kiddy Shoe Service at December 31, 1920, amounted to $39,598.97 and at December 31, 1921, $61,071.24. The accounts payable were separate and distinct from the trade acceptances.

XXIII. On March 1, 1921, 100 shares of the stock of the Kiddy Shoe Service were issued to A. W. McNaughton and remained in his name until 1923. McNaughton paid $5,000 cash on the date that the stock was issued to him and later was credited with $166.65. The balance of the subscription was never paid by McNaughton and during the year 1923 the stock was transferred to Harry E. Eby, who paid the corporation the balance of the unpaid subscription.

XXIV. During the year 1920 Paul M. Badorf was the holder of 100 shares of the stock of the Kiddy Shoe Service. At January 1, 1920, the unpaid balance was $5,847.50 and at January 1, 1921, was $1,279.58 and at January 1, 1922, was $2,430.61.

XXV. On January 19, 1927, Harry Eby Shoe Company, Incorporated, duly filed with the said collector a claim for refund in the amount of $11,696.97, the basis of which said claim is that Harry Eby Shoe Company, Incorporated, was during the years 1919, 1920, and 1921, affiliated with Kiddy Shoe Service, Incorporated, and with the Eby Shoe Company, Incorporated, within the meaning of the said section 240 of the said revenue acts of 1918 and 1921.

XXVI. The said Harry Eby Shoe Company, Incorporated, was notified by bureau letter dated March 17, 1927, that its claim for refund of $11,696.97 would be rejected.

XXVII. On October 26, 1928, the plaintiff on behalf of Harry Eby Shoe Company, Incorporated, filed with the said collector a claim for refund for the year 1920 in the amount of $3,507.19 and for the year 1921 in the amount of $8,877.69, the basis of which said claims is that Harry Eby Shoe Company, Incorporated, was during the said years affiliated with the Kiddy Shoe Service, Incorporated, within the meaning of section 240 of the revenue acts of 1918 and 1921.

XXVIII. The said claims for refund in the amounts of $3,507.19 and $8,877.69 were rejected in full by the Commissioner of Internal Revenue on March 22, 1929.

XXIX. The total tax liability of Harry Eby Shoe Company, Incorporated, and Kiddy Shoe Service, Incorporated, determined on the basis of section 240 of the revenue acts of 1918 and 1921, amounts to $175.41 for the year 1920 and to $6,586.53 for the year 1921.

The court decided that plaintiff was entitled to recover, with interest.

WILLIAMS, *Judge*, delivered the opinion of the court:

The issue presented on the foregoing findings of fact is whether or not the plaintiff's predecessor, the Harry Eby Shoe Company, and the Kiddy Shoe Service, Inc., were affiliated corporations for the years 1920 and 1921 within the meaning of the revenue acts of 1918 and 1921.

If they were affiliated corporations for the years in question, the total tax liability of the two companies, determined on the basis of section 240 of the revenue acts of 1918 and

1921, amounts to $175.41 for the year 1920 and to $6,586.53 for the year 1921, and the plaintiff has made an overpayment of its taxes for the two years in the sum of $9,500.66.

The applicable provisions of the revenue act of 1918 (the provisions of the 1921 act being substantially the same) are as follows:

"SEC. 240. (a) That corporations which are affiliated within the meaning of this section shall, under regulations to be prescribed by the commissioner with the approval of the Secretary, make a consolidated return of net income and invested capital for the purposes of this title and Title III, and the taxes thereunder shall be computed and determined upon the basis of such return. * * *

"(b) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests."

Neither the plaintiff's predecessor, the Harry Eby Shoe Company, nor the Kiddy Shoe Service Company, owned or controlled any part of the stock of the other during the years in question, and if the two corporations are deemed to be affiliated it must be because "substantially all their stock is owned or controlled by the same interests."

An examination of the list of stock owners of these corporations discloses that a group of shareholders, who owned stock in both companies during the year 1920, owned 474 out of 484 shares, or 98 per cent plus, of the stock of the Harry Eby Shoe Company for that year, and owned 770 out of the 1,000 shares of the Kiddy Shoe Service Company, or 77 per cent of the stock of that company. The same stockholders owned, during the year 1921, 954 shares out of 968 shares of stock, or 98 per cent plus, of the Harry Eby Shoe Company, and 1,140 shares out of 1,435 shares, or 78 per cent plus, of the stock of the Kiddy Shoe Service Company.

Opinion of the Court

The 230 shares of stock held by minority stockholders of the Kiddy Shoe Service Company for the year 1920 were owned as follows:

E. N. Eby, father of Harry Eby, the president of both companies, 40 shares.

Elias Eby, brother, 20 shares.

John S. Badorf, uncle, 60 shares.

Paul M. Badorf, cousin, 100 shares.

Elizabeth Holtzhouse and H. E. Holtzhouse, 5 shares each.

The minority stockholders of the Kiddy Shoe Service Company for the year 1921 were:

E. N. Eby, 60 shares.

Elias Eby, 30 shares.

John S. Badorf, 80 shares.

Paul M. Badorf, 110 shares.

Elizabeth Holtzhouse, 10 shares.

E. H. Holtzhouse, 5 shares.

The record further discloses that a group of stockholders closely related by blood or marriage owned a very large per cent of the stock of both companies. For the year 1920 this family group owned 95 per cent of the stock of the Kiddy Shoe Service, and 79 per cent plus of the stock of the Harry Eby Shoe Company. For the year 1921 they owned 97 per cent plus of the Kiddy Service stock and 79 per cent plus of the stock of the Harry Eby Shoe Company.

Out of the 16 persons owning stock in the two corporations, 12 are members of this closely related family group. Harry Eby was president of both corporations, and with a single exception all the officers and directors of both corporations were members of the family group.

Under these facts was substantially all the stock of these two corporations owned or controlled by the same interests within the meaning of the revenue acts of 1918 and 1921? We are of the opinion that such was the case and that the two corporations were affiliated during the years 1920 and 1921.

In *Hagerstown Shoe & Legging Co.*, 1 B. T. A. 666, the board said:

"Are we, in applying this statute, to look at the tabulated statement of stock ownership and, because it there appears that several persons are stockholders of one or the other legal entity and not of both, say that this alone is determinative? We have had occasion in other appeals on other questions to say—and we can not too often repeat—that all facts must be considered. These problems are not flat mathematical or legalistic puzzles; they are vital, and must be examined in three dimensions with the light of reality. No solution otherwise arrived at could long survive. Here the table of percentages changes its color entirely in the light of the circumstances under which the percentage distribution exists, and, instead of indicating a substantial independent minority, indicates that 'substantially all the stock of two * * * corporations is owned or controlled by the same interests.'"

In *Germantown Braid Company*, 3 B. T. A. 1336, the meaning of "the same interests" is further discussed and defined:

"The 'same interests' does not necessarily mean the same individuals. The relationship between the individuals and the facts and circumstances of the case should be considered in determining whether different individuals are in fact 'the same interests.' Family groups owning stock in different corporations, under the circumstances of this case, may fairly be said to be the same interests."

The Board of Tax Appeals has frequently and consistently held that blood relationship is a factor to be taken into consideration in determining whether the shares of stock in different corporations are owned or controlled by the same interests. *Wright Cake Co.*, 2 B. T. A. 58; *Gage Hat Works*, 7 B. T. A. 1219; *Jordan Marsh Co. and Avon Street Trust*, 3 B. T. A. 553.

In *Highland Land Company, Ltd.*, 2 B. T. A. 100, it was held that a limited partnership and a corporation were affiliated where two brothers owned 79 per cent of the stock of one and 98⅔ per cent of the stock of the other, the remaining 21 per cent of the former being owned by two sisters and a brother of the majority stockholders.

Opinion of the Court

In *Wright Cake Company*, *supra*, two corporations were held to be affiliated where the same person owned 97.06 per cent in one, 62.5 per cent in the other, the remaining stock being owned by his wife and son in different proportions.

We believe these decisions of the Board of Tax Appeals correctly interpret the meaning of subsection (b) of section 240 of the revenue acts of 1918 and 1921 as to what constitutes "substantially all the stock of two or more corporations" and what comprises "the same interests." As before stated identical stockholders during the year 1920 owned 98 per cent plus of the stock of Harry Eby Shoe Company, and 77 per cent of the stock of the Kiddy Shoe Service Company, and for the year 1921 they owned 98 per cent of the stock in the Harry Eby Shoe Company and 78 per cent plus of the stock of the Kiddy Shoe Service Company, and during the same years the closely related family group owned 95 per cent and 97 per cent of the stock of the Kiddy Shoe Service Company and 79 per cent of the stock of the Harry Eby Shoe Company.

These facts, taken into consideration with the further fact, fully disclosed by the findings, that the two companies during the years in question were practically operated as one business unit with the apparent consent of the stockholders of both companies, unquestionably show that substantially all the stock of both corporations was owned, and controlled by the same interests.

The plaintiff having within the time provided by law filed its claim for a refund of the additional taxes paid on January 5, 1927, and the interest thereon paid on January 21, 1927, is entitled to a judgment for the amounts so paid with interest as provided by the statute.

Judgment for $9,500.66 is hereby awarded. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear and took no part in the decision of this case.

CONTINENTAL PRODUCTS CO. v. THE UNITED STATES [1]

[No. H–21. Decided October 20, 1930]

On the Proofs

Income and profits tax; affiliated corporations; management contract.—Where under the terms of a management contract a company gives complete control over its business to a minority stockholder, the employment is not such as to give control of all the stock to the majority stockholder within the meaning of the revenue acts defining affiliated companies.

Same; mutual restriction over stock.—Where the restriction on the sale of each other's stock is mutual, one company can not be said, because of such restriction over the other, to control the other.

Same; effect of proxies.—The ruling of the Board of Tax Appeals, that proxies are to be construed as granting the power to vote stock in the ordinary concerns of corporations, unless their terms are special, and are no authority to vote for the reorganization of the corporation, its consolidation with another corporation, or the sale of all of its property, or a voluntary liquidation of its affairs, cited with approval.

The Reporter's statement of the case:

Mr. William R. Brown for the plaintiff. *Mr. James D. Cooney* was on the brief.

Mr. Isadore Graff, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant. *Messrs. R. C. Williamson* and *Ottamar Hamele* were on the brief.

The court made special findings of fact, as follows:

I. The Brazil Railway Company was incorporated under the laws of the State of Maine on November 12, 1906. During the year 1917 the Brazil Railway Company had issued and outstanding $32,000,000 par value of common stock and $20,000,000 par value of preferred stock, of which $35,000,000 was issued for property and $17,000,000 was issued for cash. It was intended to link up the railways in the four temperate States of Brazil. One of the objects of the Brazil Railway was to hasten the development of the territory

[1] Certiorari applied for.

traversed by the railways by fomenting agricultural, pastoral, and manufacturing development.

In pursuance of this plan, the Sorocabana Railway Company and the Uruguay Railway Company were incorporated, and throughout the calendar year 1917 were engaged in the business of constructing and operating railways in Brazil and Uruguay. These railway lines were physically connected and operated as a single railway system.

Nearly all the stock of the Sorocabana Railway Company was owned by the Brazil Railway Company, which also owned all the stock of the Uruguay Railway Company.

Subsequent to the incorporation of the Brazil Railway Company, the Southern Brazil Lumber & Colonization Company, the Brazil Development & Colonization Company, the Sao Paulo Development & Colonization Company, and the Bolivia Development & Colonization Company were incorporated, and prior to and in 1917 were engaged in the development and colonization of the territories in South America adjacent and contiguous to the railway lines above mentioned, or some of them. All of the stock of the Southern Brazil Lumber & Colonization Company, the Brazil Development & Colonization Company, and the Bolivia Development & Colonization Company was owned by the Brazil Railway Company. The stock of the Sao Paulo Development & Colonization Company was owned by the Sorocabana Railway Company.

II. On September 21, 1911, the Brazil Railway Company caused the organization of the Brazil Land, Cattle & Packing Company for the purpose of acquiring land and cattle in the territory tributary to the railways above mentioned, with power to transact nearly every kind of business except the banking business. In 1912 it acquired about 7,000,000 acres of land and 150,000 head of cattle. In order to obtain means to acquire this property, it contracted indebtedness to the Brazil Railway Company in the sum of $7,128,007.66 and $1,686,462.03 to the Sao Paulo Development & Colonization Company.

The Brazil Land, Cattle & Packing Company issued 250,000 shares of stock. At the beginning of the taxable year ending December 31, 1917, the Brazil Railway Com-

pany held 230,505 shares of this stock, and on June 19, 1917, acquired 200 shares more from Murdo Mackenzie. The Brazil Company held 8,320 shares, the Southern Brazil Securities Company held 10,700 shares, and E. Stollarts and Alfred Lowenstein, of Brussels, Belgium, held 270 shares of said capital stock throughout this taxable year. The remaining 5 shares were owned one each by the directors of the Brazil Land, Cattle & Packing Company. Murdo Mackenzie was employed as manager of the Brazil Land, Cattle & Packing Company and had received the 200 shares of stock which he held as a part of his compensation under his employment contract with that company. Rodney D. Chipp was treasurer of the Brazil Land, Cattle & Packing Company.

The special business of the cattle company was raising purebred, or cattle in which the breed had been improved, and swine, and developing the cattle business among others in the territory tributary to the railways, and increasing the traffic of the railways' shipment of cattle or swine by itself or others.

One of the purposes for which the cattle company was organized was to construct and operate a packing house. Having no one in its employ who was experienced or competent to superintend the construction or operation of the packing plant when completed and ready for operation, and having no market facilities or selling organization for the sale of the products of the packing house, the Brazil Land, Cattle & Packing Company entered into a contract with G. F. Sulzberger to manage and control these matters, which contract later was assigned to the Sulzberger Products Company, a corporation. The Sulzberger Products Company was later organized solely for the purpose of managing the proposed packing plant and owning stock therein. In accordance with the contract with Sulzberger and the Sulzberger Products Company, the Continental Products Company, plaintiff herein, was incorporated on December 23, 1912, for the purpose of engaging in the slaughter of cattle and other livestock and the marketing of the products. The agreement between the cattle company and Sulzberger pro-

vided that the cattle company should take 77½ per cent of the stock in the Continental Products Company and Sulzberger the remainder. This agreement and contract being subsequently assigned to the Sulzberger Products Company, it took this amount of stock instead of Sulzberger. The Sulzberger Products Company at no time owned any property other than stock in the Continental Products Company, the plaintiff, and at no time engaged in any business enterprise other than the duties imposed upon it by its contract with plaintiff as hereinafter set forth. All of its stock was owned by Sulzberger & Sons Company, to which company reference is hereinafter made in Finding IV.

III. On January 4, 1913, the plaintiff and the Sulzberger Products Company entered into a contract whereby it was agreed, among other things, that—

"The Sulzberger [Products] Company shall manage the construction and operation" of the packing plant and appurtenances, and "shall decide what policies shall be pursued in said business" (the operation of the packing plant), including prices paid for livestock and materials and "prices at which its products shall be sold."

The contract also provided for reports to be made on request of the board of directors of the plaintiff, but this provision "shall not be construed as giving to the board of directors of the products company any right or power, during the term of this agreement, to interfere with or restict in any way the absolute management and control by the Sulzberger Company of the business of the products company as provided in this agreement"; and that Sulzberger & Sons Company should allow the Sulzberger Products Company the use of its selling organization.

The term of the agreement was for twenty years, and for the first ten years the plaintiff was required to pay the Sulzberger Products Company for its services $60,000 a year, and thereafter a sum fixed by agreement. The general powers of the stockholders, directors, and officers of the plaintiff were otherwise not changed by the contract.

IV. The Brazil Land, Cattle & Packing Company transferred to the plaintiff premises for the construction of the packing house, which when completed cost $1,153,784.98;

and Sulzberger & Sons Company, which had a complete organization for marketing packing-house products at wholesale prices to retail dealers throughout the consuming markets of Europe and the United States, took charge of the sales of the products of the plaintiff's packing house and plaintiff used no other sales facilities or organizations. These sales were made by Sulzberger & Sons Company on a commission basis.

V. Throughout the calendar year 1917 the Brazil Land, Cattle & Packing Company operated cattle ranches in Brazil and produced cattle suitable for slaughter for export to the European market.

Continental Products Company operated a slaughterhouse and meat-packing plant at Osasco, Brazil, and slaughtered cattle and other livestock for the European market. During the year 1917 the Continental Products Company slaughtered 8,751 head of cattle at its said plant, procured from the ranches of the Brazil Land, Cattle & Packing Company.

A contract was made between the cattle company and plaintiff whereby the cattle company would sell plaintiff 10,000 cattle at 7¢ per aroba, and when the beef was sold the plaintiff was to get a profit of 3¢ per aroba to begin with, and anything above that was to be divided equally between the packing house and the cattle company. A settlement was made in 1917, and $25,000 was paid by the plaintiff to the cattle company.

Later the cattle company sold the plaintiff 10,000 more cattle, and under that sale the cattle company got 8½¢ to begin with and the plaintiff was allowed 3¢, and then the profit was divided equally between the plaintiff and the cattle company. Settlement for this contract was made in 1917.

From the time that the packing company started to operate until after the year 1917, with the exception of 2,000 cattle, all of the cattle company's cattle were slaughtered by the plaintiff. During this time the plaintiff advertised in the papers that for the improved stock, both hogs and cattle, extra money would be paid. The manager of

the packing company was instrumental in getting the plaintiff to do this.

VI. The Brazil Railway Company at all times prior to December 31, 1917, maintained its offices in the United States, in New York City. The Sorocabana Railway Company, Brazil Land, Cattle & Packing Company, Brazil Development & Colonization Company, Sao Paulo Development & Colonization Company, Southern Brazil Lumber & Colonization Company, Uruguay Railway Company, Bolivia Development & Colonization Company, and the plaintiff, Continental Products Company, had offices in the same premises in New York City and the same clerks and employees. Rodney D. Chipp and Theo. C. Hall were in charge of the said New York office, and of all the business of all of said companies conducted from said New York office. Rodney D. Chipp first became associated with Percival Farquhar in 1901 or 1902, and first became associated with the Brazil Railway Company at the time of its organization. The salary of Rodney D. Chipp was paid by the Brazil Railway Company, and this salary, the rent, and other office expenses were prorated amongst all the various companies, apportioned in relation to what they considered was the amount of work done for each company.

VII. The meetings of the stockholders of the Brazil Land, Cattle & Packing Company were all held in the office of the Corporation Trust Company, in Portland, Maine. Rodney D. Chipp prepared the minutes of the meetings in the office in New York City and sent the minutes with the proxies of the Brazil Railway Company, Brazil Company, Southern Brazil Securities Company, and Percival Farquhar to the Corporation Trust Company to hold the meeting. The last meeting held was in the year 1915. There were no further meetings of the stockholders until the year 1920.

VIII. On January 8, 1922, the Deputy Commissioner of Internal Revenue held that during the taxable year 1917 the Brazil Railway Company, the Brazil Land, Cattle & Packing Company, Brazil Development & Colonization Company, Bolivia Development & Colonization Company, Sao Paulo Development & Colonization Company, Soroca-

bana Railway Company, Southern Brazil Lumber & Colonization Company, and Uruguay Railway Company were affiliated within the purview of articles 77 and 78 of Regulations 41, under the revenue act of 1917.

IX. At the beginning of the taxable year ending December 31, 1917, Continental Products Company had outstanding 10 shares of preferred stock of the par value of $100 each. Of these shares, 6 were owned by the Brazil Land, Cattle & Packing Company and 4 shares were held by others. All of such shares were fully paid in cash. There were also outstanding 15,000 shares of a par value of $100 each, of the common capital stock of the plaintiff, 11,625 shares of which were owned by the Brazil Land, Cattle & Packing Company and 3,375 shares were owned by the Sulzberger Products Company.

Both the Brazil Land, Cattle & Packing Company and the Sulzberger Products Company paid cash for their respective stockholdings in the plaintiff corporation.

X. S. Feinberg was the secretary of Rodney D. Chipp. Rodney D. Chipp had no connection with Sulzberger Products Company, and Sulzberger Products Company paid no part of his salary or the office expense.

The Corporation Trust Company was the agent for the Continental Products Company in the State of Maine. Rodney D. Chipp sent out the notices for the annual meeting of the Continental Products Company. The meetings of the stockholders of the Continental Products Company were all held in the Portland office of the Corporation Trust Company. Proxies were prepared by Rodney D. Chipp in the New York office, to be signed by the Sulzberger Products Company. Such proxies were signed by the Sulzberger Products Company for each and every stockholders' meeting held prior to the end of the calendar year 1917. The proxies, when signed by Sulzberger Products Company, were returned to the said New York office. Minutes of the stockholders' meeting were then prepared by Rodney D. Chipp at the New York City office, with blank spaces for the signatures of the officers, and the only persons Rodney D. Chipp consulted with reference to what these minutes should contain were the attorneys for the Brazil Railway Com-

pany, Storey, Thorndike, Palmer & Dodge, of Boston. These minutes were then either taken by Rodney D. Chipp or mailed with the proxies to the Portland office of the Corporation Trust Company. The clerk and chairman signed the minutes of the stockholders' meeting and returned them to the said New York office. These minutes were then incorporated in the plaintiff's minute book as the minutes of the stockholders' meeting.

During the years involved the stock of the Sulzberger Products Company was voted by someone who held a proxy authorizing him to vote the same. In the years 1913, 1914, and 1915 the stock was voted by Albert F. Jones, who was not an officer or director or in any manner connected with the plaintiff, the Brazil Land, Cattle & Packing Company or the Brazil Railway Company. For the years 1916 and 1917 the stock was voted by Rodney D. Chipp. Mr. Chipp was secretary and treasurer of the plaintiff and treasurer of the Brazil Land, Cattle & Packing Company.

During the years 1913, 1914, and 1916 the stock of the Brazil Land, Cattle & Packing Company was voted by proxy by James E. Manter. In 1915 it was voted by Rodney D. Chipp, and in 1917 it was voted by T. L. Croteau. Mr. Croteau had no official connection with any of the companies, but Mr. Manter was the clerk of the Brazil Railway Company and the Brazil Land, Cattle & Packing Company.

XI. Prior to the annual meeting of stockholders of Continental Products Company, Rodney D. Chipp requested and received from Sulzberger Products Company a general proxy for its stock voted at such meeting.

At the annual meeting of stockholders each year from the incorporation of the Continental Products Company, including the calendar year 1917, all the stock was voted as a unit under the general proxies theretofore executed by the respective stockholders.

XII. During the years 1916 and 1917 the directors of plaintiff company were W. Cameron Forbes, Charles E. Perkins, Rodney D. Chipp, Elisha Walker, and Thomas E. Wilson. During those years W. Cameron Forbes was receiver of the Brazil Railway Company, and he and Charles E. Perkins were joint receivers of the Uruguay Railway

Company and of the Brazil Land, Cattle & Packing Company. During those years Rodney D. Chipp was treasurer of all of the affiliated companies of the Brazil Railway Company. The office of president of plaintiff company was vacant. The vice president was Theo. C. Hall, who was also vice president of the Brazil Railway Company and all of its affiliated companies. He was also a director of the Sao Paulo Development & Colonization Company. Rodney D. Chipp was also a director of the Sao Paulo Development & Colonization Company.

XIII. On June 10, 1918, the plaintiff filed its income and excess-profits tax returns for the calendar year 1917 with the collector of internal revenue for the district of Maine. These returns disclosed a total tax liability of $365,467.87, consisting of $320,174.55 excess-profits tax and $45,293.32 income tax. These taxes were paid to the collector on June 25, 1918.

XIV. On March 27, 1923, plaintiff filed with the collector of internal revenue at Portsmouth, New Hampshire, and also the Commissioner of Internal Revenue, Treasury Department, Washington, D. C., a waiver of its right to have the taxes due for the calendar year 1917 determined and assessed within five years after the return was filed, as provided in section 252 of the revenue act of 1921 and amended by the act of March 4, 1923.

XV. On February 19, 1923, the plaintiff filed a claim for the refund of the excess-profits taxes paid by it for the year 1917, based on the ground that it should have filed a consolidated excess-profits tax return with the Brazil Railway Company for that year, and that a consolidation of its accounts with the Brazil Railway Company would result in no excess-profits tax due from it in 1917.

XVI. On January 27, 1924, the plaintiff filed with the collector of internal revenue at Portsmouth, New Hampshire, a claim for the refund of income and excess-profits taxes paid for the year 1917.

XVII. The Commissioner of Internal Revenue disallowed both of the aforesaid claims for refund on March 18, 1925.

XVIII. The parties have stipulated that if the plaintiff corporation is held to be affiliated with the Brazil Railway Company for the taxable year ending December 31, 1917, judgment should be for the plaintiff in the sum of $300,-964.08, with interest thereon at the rate of six per cent per annum from June 25, 1918, the date of the collection.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff in this case seeks to recover $300,964.08, with interest, which it claims to be due it as a refund upon taxes paid for the year 1917.

The contention of the plaintiff is that during that year it was affiliated with another corporation, the Brazil Railway Company, and it is conceded that if it was so affiliated within the meaning of the revenue laws, it is entitled to the refund. The defendant disputes this affiliation, which constitutes the sole issue in the case.

There is no dispute as to the facts, although there is much contention as to what deductions may be drawn from them. The Brazil Railway Company, with which the plaintiff claims to be affiliated, was incorporated in 1906, and issued for property and cash, stock to the amount of $52,000,000. As its name would indicate, it was engaged in the railway business in Brazil for the purpose of constructing and operating railways and developing the territory traversed thereby. The Sorocabana Railway Company and the Uruguay Railway Company were organized for the purpose of constructing and operating railways in Brazil and Uruguay, and all or nearly all the stock of these companies was issued to and owned by the Brazil Railway Company. Several other companies were organized for the purpose of developing the territory tributary to, the railway lines of the companies above mentioned as subsidiaries either to the Brazil Railway Company or one of the subsidiary railway companies above mentioned.

On September 21, 1911, the Brazil Railway Company caused the organization of the Brazil Land, Cattle & Pack-

ing Company with very extensive powers, but with the particular purpose of acquiring land, cattle, and swine, and improving the breed of the cattle, and developing the cattle business in the territory tributary to the railways. Another purpose for which this cattle company was organized was the construction and operation of a packing plant. To carry out this purpose a contract was made with G. F. Sulzberger, which was subsequently assigned to the Sulzberger Products Company, a corporation organized solely for the purpose of constructing and managing the proposed packing plant. It provided for the organization of a new company for that purpose, and in pursuance of the agreement the plaintiff was organized on December 23, 1912. The Brazil Land, Cattle & Packing Company acquired 77½ per cent of the issued common stock of the plaintiff and the Sulzberger Products Company acquired the remaining 22½ per cent. The capital stock of the Sulzberger Products Company was owned by Sulzberger & Sons Company, which had for many years operated in Europe and the United States the business of selling meats and other packing-house products at wholesale. A contract for the construction and management of the packing house was entered into between plaintiff and the Sulzberger Products Company which, among other things, provided that the Sulzberger Products Company should manage the construction and operation of the packing plant of plaintiff and should decide what policies should be pursued in the conduct of plaintiff's business; also that the Sulzberger Products Company should be vested with the *absolute management and control* of the business of the plaintiff without the right or power of interference or restriction by the board of directors of the plaintiff. The contract further provided that the term of the agreement should be for twenty years and for the first ten years thereof the plaintiff should pay the Sulzberger Products Company for its services $60,000 a year, and thereafter such a sum as should be fixed by agreement; otherwise the powers of the directors, stockholders, and officers of the plaintiff were not modified.

Opinion of the Court

The law applicable to the case is found in section 1331 of the revenue act of 1921, providing for the construction of the revenue act of 1917 with reference to the corporations that are affiliated and the imposition of taxes on the basis of consolidated returns of net income and invested capital. This section provides that a corporation or partnership is affiliated with other corporations or partnerships—

"(1) when such corporation or partnership owned directly or controlled through closely affiliated interests or by a nominee or nominees all or substantially all the stock of the other or others."

It will be observed that the Brazil Railway Company, with which the plaintiff claims to be affiliated, owned no stock in the plaintiff company. It did, however, own all the stock of the Brazil Land, Cattle & Packing Company, which company owned 77½ per cent of the stock of the plaintiff company. If it controlled the remainder "through closely affiliated interests or by a nominee or nominees," this would come within the provision above quoted and the companies would be deemed to be affiliated. It is argued that plaintiff controlled the remaining stock which was held by the Sulzberger Products Company because that company was an employee of the plaintiff, and by reason of this fact plaintiff controlled the stock held by the Sulzberger Products Company, which was organized solely for the purpose of carrying on plaintiff's business.

The courts have held in some cases where an employee holds stock and his position is such that the company which employs him virtually controls his action with reference to the stock that this is such control as is referred to by the statute. But this is as far as any of the cases go, and we think that if the holder of the stock occupied such a position as to make him entirely independent of the party who claimed control thereof it can not be properly held that such stockholders come within the provisions of the statute quoted. In the instant case the evidence not only fails to show that the Sulzberger Products Company which owned the minority stock, occupied such a position, but it negatives such a claim and declares to the contrary. The

Opinion of the Court

Sulzberger Products Company had absolute and complete control over the business of the plaintiff under the terms of the management contract. The plaintiff had absolutely nothing to say as to how the business was to be carried on. The Sulzberger Products Company could even borrow money to carry on the business without interference from the plaintiff. This was no ordinary contract of employment in which the employer had direction of the work of the employee. On the contrary, the employee had the direction and control of everything in relation to the business. If the situation had been reversed, the Sulzberger Products Company holding 77½ per cent of the stock, and a contract was entered into with the minority stockholder giving the majority stockholder the absolute control of the business, we could readily say that the two companies were affiliated, but there was nothing of the kind shown in the case, and if there was it would not help plaintiff's case. The fact that the Sulzberger Products Company, although only the minority stockholder in the company which is plaintiff herein, controlled the policies of that company, might show that these two companies were affiliated, but in order to enable plaintiff to recover herein, the affiliation must be between the plaintiff and the Brazil Railway Company.

It is urged on behalf of plaintiff that the control referred to in the statute is control of the stock and not control of the business. But what is the stock issued for? One of the main purposes is to give the stockholders the control of the business and the policies of the corporation, and where the stockholders can do nothing but approve the acts of the party to whom the management of the business and the control of its policies have been delegated, for all practical purposes they have parted with the control of the stock. In *Isse Koch & Co.*, 1 B. T. A. 624, 627, it is said:

"There is no authority in the section of law referred to or in its context, so far as we can see, for assuming that Congress intended to use the word 'control' in other than its ordinary and accepted sense."

All that the stockholders of the Continental Products Company could do was to either ratify the acts of the Sulz-

berger Products Company in carrying on the business of the plaintiff or to refuse to comply with the contract between the two corporations, in which event the whole business would have come to an end. Plaintiff and its stockholders did not refuse to conform to the contract, but, on the contrary, accepted it and control by the Sulzberger Products Company.

Even if it should be held that the control of the Sulzberger Products Company over the management of the affairs of plaintiff did not in effect give the Sulzberger Products Company control of the majority stock, it would still be clear that the provision with reference to management gave plaintiff no control over the stock owned by the Sulzberger Products Company. That company was free from domination by the Brazil Railway Company or any of its affiliated interests and could therefore vote or use its stock in any way that it wished, subject to the restrictions hereinafter mentioned.

Counsel for plaintiff urge in support of their contention that the Brazil Railway Company controlled the minority stock of the plaintiff company, that the contract between the Sulzberger Products Company and the plaintiff provided that neither could sell its stock without the consent of the other. As before stated, it is conceded that the Brazil Railway Company was affiliated with the Brazil Land, Cattle & Packing Company which owned the majority of the stock in the plaintiff company and as a matter of course controlled the stock that it owned. The argument therefore is in effect that because of this restriction on the sale of the stock, the majority interests controlled the stock held by the minority. The flaw in this argument arises from the fact that the restriction on the sale of stock was mutual, and provided that neither should dispose of its stock for the period of twenty years. The minority stockholders had the same control over the stock held by the majority as the majority had over that held by the minority. Moreover, the situation is very different from one in which the majority stockholders have the right to purchase the stock of the minority or even that where the minority can not sell to anyone except the majority. In these situations there is evidence of control,

but in the instant case the restriction which the contract provided, rather than showing a common or a controlling interest, appears to us to show that the interests were adverse. In other words, the provision was inserted evidently for the purpose of enabling one party to prevent the other from selling out its stock to an undesirable associate, and each had the same "control" in this respect.

The same principle applies to the restriction on the payment of dividends. The by-laws of the plaintiff required the consent of four-fifths of the stockholders in order that a dividend might be declared. The majority stockholders did not own four-fifths, so that it might be claimed that this provision strengthened the control which the minority stockholders had over the management of the company. However this may be, the restriction was mutual and each acquired thereby the same "control" over the stock of the other.

Subdivision (1) of section 1331 of the revenue act of 1921, already quoted, provides that affiliation may be established when all of the stock of the corporation as to which it is claimed to exist is controlled by a nominee or nominees of the other. In order to bring itself within this provision, plaintiff must show by the evidence that substantially all the stock was controlled by a nominee of the Brazil Land, Cattle & Packing Company. The evidence does show that Rodney D. Chipp, who was treasurer of the Brazil Land, Cattle & Packing Company in 1917, at the meetings of the directors of plaintiff company, held proxies from the Sulzberger Products Company to vote all of its stock. The question of whether the receipt of these proxies and the use made thereof showed control of the stock belonging to the Sulzberger Products Company is discussed at length in argument of counsel, but we do not need to pass upon the question thus raised. Rodney D. Chipp was also the secretary and treasurer of the plaintiff. There is nothing in the evidence to show that he was nominated or in any way selected by either the plaintiff or the Brazil Land, Cattle & Packing Company to obtain and vote the proxies which he received. If we were to speculate upon the probabilities, it would seem more likely that he was selected by the plain-

tiff for that purpose in order that its directors, who represented all of its stockholders, should have a voice in determining who should vote at the stockholders' meetings. In any event, he was as much the nominee of the Sulzberger Products Company as of the Brazil Land, Cattle & Packing Company. But however this may be, there is no evidence that he was named for this purpose by the last-named company, and the provisions of the statute last under discussion can not avail the plaintiff.

It should be noted in this connection that the giving of a proxy at most makes the proxyholder only an agent of the donor. The Board of Tax Appeals said in *Tunnel Railroad of St. Louis*, 4 B. T. A. 596, that proxies are to be construed as granting the power to vote stock in the ordinary concerns of corporations, unless their terms are special, and are no authority to vote for the reorganization of the corporation, its consolidation with another corporation, or the sale of all of its property, or a voluntary liquidation of its affairs. We think this is the correct rule. Applying it to the situation in the case at bar, we find that the granting of proxies to vote the stock of plaintiff gave little if any more authority than to confirm the acts of the Sulzberger Products Company in the management of plaintiff's affairs. Clearly all the important matters of control were left in the hands of the Sulzberger Products Company by the contract between it and the plaintiff.

Under provisions of the statute in addition to those which we have already quoted, in order to make out a case of affiliation, it must also be established either that the corporations alleged to be affiliated were engaged in the same or a closely related business, or one corporation bought from or sold to the other products or services at prices above or below the current market, thus effecting an artificial distribution of profits; or one corporation so arranged its financial relationships with the other as to assign to it a disproportionate share of net income or invested capital. These requirements, it will be observed, are in addition to the requirement of a showing that substantially all of the stock is controlled by another corporation or closely affiliated interests, and it is only necessary to determine whether they

have been complied with in event it should be found that such control was established by the evidence. If this should be found (contrary to the conclusion which we have reached above), then it will be necessary to determine whether any one of these additional requirements has been established by the evidence.

When we consider whether the corporations were engaged in the same or a closely related business, there would seem to be no doubt that they were not. This provision, in our judgment, refers to the two companies that are to be considered as affiliated. In the instant case these companies are the Brazil Railway Company and the plaintiff. We do not think anyone would claim that the business of the railway company and that of the plaintiff, which was carrying on a packing plant, were the same or even closely related. The attorneys for plaintiff seem to consider that under this provision of the statute the business of the plaintiff can be compared with any company which was affiliated with the Brazil Railway Company, but we do not think that this is a proper construction of the language used in the law. As we construe the statute, the comparison can only be properly made between the two companies which it is sought to prove are affiliated.

Some argument is made based upon the claim that the plaintiff and the other corporations had an interlocking directorate. Thomas E. Wilson was one of the directors of plaintiff and also of the Sulzberger Products Company in the year 1917. The other four directors of the Sulzberger Products Company did not belong to the directorate of any of the other companies. It is quite clear that there was no interlocking directorate between the Sulzberger Products Company and the plaintiff or any of the companies with which it was affiliated.

The plaintiff claims that it purchased cattle from the Brazil Land, Cattle & Packing Company at arbitrary prices and that upon the sale of the meats a division of the profits was made.

The cattle purchased by the plaintiff from the Brazil Land, Cattle & Packing Company were bought pursuant to a contract under which the plaintiff agreed to pay 7 cents or 8½

cents per aroba upon delivery of the cattle, and when the meat was sold the cattle company was to receive 3 cents additional per aroba, and anything remaining was to be divided equally between the plaintiff and the Brazil Land, Cattle & Packing Company. There is no evidence as to what the market price of the cattle was at the time and nothing to show whether in the final settlement the cattle company received more or less than it might at ordinary prices. In other words, it does not appear that the price was arbitrary or an unreasonable one, nor was there anything unusual about the contract.

Some claim is made that the expenses of the New York office were arbitrarily apportioned between the plaintiff and the other companies, but there is nothing in the evidence to sustain this claim.

It is also contended that the Brazil Railway Company or its affiliated companies assigned to plaintiff a disproportionate share of invested capital. Counsel for plaintiff state—

"Notwithstanding the cattle company having no paid-in invested capital, it subscribed and paid $1,162,500 in cash for 11,625 shares of stock of the Continental Products Company; thus so arranging the artificial relationship between these corporations as to assign to the Continental Products Company a disproportion of the invested capital."

Whatever these facts may indicate as between the Brazil Railway Company and the Brazil Land, Cattle & Packing Company, they utterly fail to show that the plaintiff was assigned a disproportionate share of invested capital. In fact, there is no showing whatever as to how much invested capital plaintiff needed, except that there is evidence that the packing plant cost $1,153,784.98 and that plaintiff bought 300 acres of land from the cattle company. The capital stock of the plaintiff was subscribed and issued for cash. Obviously it needed a capital in excess of the cost of its packing plant for operating purposes. The evidence does not disclose how much this would be, nor is there anything to indicate that the total amount of its capital was in excess of its actual needs for carrying on the business.

Counsel for plaintiff have cited some sixty cases which it is claimed support their contentions. The reasonable limits

of an opinion forbid the review of the decisions therein. All of these cases have been examined with care, and when the facts which were shown therein are taken into consideration we think there is nothing which conflicts with this opinion and much that tends to sustain it.

It follows from what has been stated above that the plaintiff and the Brazil Railway Company can not be considered under the law as affiliated corporations, and that plaintiff's petition must be dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear and took no part in the decision of this case.

CHARLES HAMILTON SABIN v. THE UNITED STATES

[Nos. H-391 and J-651. Decided October 20, 1930]

On the Proofs

Income tax; statute of limitations; waiver of assessment and collection; consent of Commissioner of Internal Revenue.—Where a taxpayer duly executed a waiver of assessment and collection within the statutory period of internal-revenue taxes and the same was accepted in writing by the Deputy Commissioner of Internal Revenue by letter in regular course, it presumptively complied with the requirement of sec. 250 (d), revenue act of 1921, that the consent be that of the commissioner and in writing. The consent having come from the commissioner's office in the regular course of business it must be presumed, in the absence of evidence to the contrary, that it was authorized by the commissioner.

Same; assessment and collection after notice of revocation of waiver; reasonable time.—In determining whether an assessment and collection of a tax was made within a reasonable time after the taxpayer had given notice of revocation and withdrawal of his waiver of assessment and collection within the statutory period of limitation, no general period can be assigned, and unreasonable length of time must be proved.

Same; waiver of assessment covering collection.—See *Stange* v. *United States*, 68 C. Cls. 395.

Same; expiration of statutory period; subsequent waiver.—Id.

The Reporter's statement of the case:

Mr. A. H. Deibert for the plaintiff. *Mr. Charles Harwood* was on the briefs.

Mr. C. R. Pollard, with whom was *Mr. Charles F. Kincheloe*, for the defendant. *Messrs. Assistant Attorney General Herman J. Galloway, Charles R. Pollard*, and *R. P. Hertzog* were on the brief.

The court made special findings of fact, as follows:

I. Plaintiff is a resident and citizen of Southampton, New York, and has his principal place of business at New York City.

II. March 1, 1916, plaintiff filed his income-tax return for the calendar year 1915, showing a tax of $72,827.28, which was paid at the time of filing the return.

III. April 30, 1917, he filed his return for 1916 showing a tax of $126,098.08, which was paid on that date.

IV. February 9, 1922, plaintiff's secretary, J. S. Johnston, addressed the following letter to Revenue Agent H. F. Smith, who had been requested by the Bureau of Internal Revenue to make a reinvestigation of plaintiff's books and records with reference to his income-tax liability for 1915 and 1916:

"Referring to the matter of income-tax situation covering Mr. Sabin's taxes for 1913, 1914, 1915, and 1916, as evidenced by reports made to the department by your division and recent request from the department at Washington for additional information, would state that it has been practically impossible for me to compile the data requested before this.

"In the reorganization of affairs at the Guaranty Trust Company I have been deprived of the services of all my assistants, necessitating my giving this matter my personal attention. This necessitates going over records for these four years, which are very numerous, running up into thousands of different accounts, and it has been impossible for me to get enough time to give undivided attention to this work.

"I would therefore request that you advise the department of the situation here and that it will be very difficult for me to get the information that they require before May 1st.

"Will you kindly advise if that date would be satisfactory to the department?"

V. March 6, 1922, the following letter was delivered to Revenue Agent Smith:

"Agreeable to your conversation this morning, I am sending you herewith waiver signed by Mr. Sabin, waiving any statutory limitations in connection with taxes which may be found due for 1915 and 1916, together with a copy of my letter dated February 9, requesting an extension to May 1 for the additional information which the department has requested.

"Just at this time we are in the midst of the preparation of returns for Mr. and Mrs. Sabin for the year 1921, and I would thank you to take this matter up again with Washington and advise me as soon as possible whether it will be agreeable for them to grant this extension as requested.

"Very truly yours,

"J. S. JOHNSTON,
"*Secretary to Mr. Sabin.*"

VI. The following consent or waiver addressed to Hon. David H. Blair, Commissioner of Internal Revenue, and signed by plaintiff, dated March 6, 1922, was enclosed with the letter quoted in the preceding paragraph:

"I hereby agree or consent to the assessment of any and all taxes which may be found due for 1915 and 1916 under the act of Congress dated September 8, 1916, and I hereby waive any statutory limitations as to the time such taxes should have been assessed.

"(Signed) CHARLES H. SABIN."

VII. March 9, 1922, prior to the receipt of the foregoing waiver in the Bureau of Internal Revenue at Washington, the following letter headed "Treasury Department, Washington, Office of Commissioner of Internal Revenue," and signed by E. H. Batson, Deputy Commissioner, by B. S. Kimbrell, Head of Division, was sent to plaintiff:

"This office has under consideration a report of the supervising internal revenue agent at New York, New York, covering an examination of your income-tax liability for 1915 to 1917, inclusive.

"It appears improbable that complete audit of the case can be made within the time specified by law for the assessment of additional taxes found due. It is suggested, therefore, in order to prevent the present assessment of additional

taxes which might, upon final audit be determined to be erroneous at least in part, that you sign the enclosed waiver, permitting the assessment of the additional taxes found due for 1916. Such waiver does not admit the correctness of any assessment proposed by this office but merely permits assessment of the amount which subsequently is found to be correct.

"Relative to your income tax liability for 1915, it appears also upon the basis of additional information submitted to this office by your representative, Mr. Morris E. Frey, that the additional liability of which you were informed by office letter dated May 19, 1921, may not be wholly correct. It is suggested also that the enclosed waiver for 1915 be executed and returned to this office.

"You are requested to give this matter your immediate attention, referring in your reply to IT: FA: FR–WBR–704.

"Respectfully,

"E. H. BATSON,
"*Deputy Commissioner.*
"By B. S. KIMBRELL,
"*Head of Division.*"

VIII. March 10, 1922, the following letter addressed to E. H. Batson, Deputy Commissioner, Treasury Department, was received in the Bureau of Internal Revenue:

"Replying to your letter of March 9, would advise that Mr. Sabin signed waiver, as per the enclosed copy, on March 6, waiving statutory limitation in connection with additional taxes that might be found due for the years 1915 and 1916.

"This waiver was handed to the agent in New York, and will be forwarded by him to your department in Washington.

"Should this waiver not prove entirely satisfactory, if you will kindly have same returned, I will substitute waivers as enclosed in your letter.

"Thanking you for your kind consideration.

"Very truly yours,

"(Signed) J. S. JOHNSTON,
Secretary to Mr. Sabin."

IX. By letter dated April 8, 1922, headed "Treasury Department, Office of Commissioner of Internal Revenue," and signed E. H. Batson, Deputy Commissioner, by B. S. Kimbrell, Head of Division, the receipt of the letter set forth in Finding VIII above was acknowledged, as follows:

"This office acknowledges receipt of a letter dated March 9, 1922, from J. S. Johnston, enclosing copy of a waiver executed by you on March 6, 1922, permitting the subsequent assessment of additional taxes found due for 1915 and 1916.

"You are advised that the original waiver has previously been forwarded to this office and is now with the case."

X. On April 8, 1922, the day on which the letter mentioned in the preceding paragraph was mailed, the following letter headed "Treasury Department, Office of Commissioner of Internal Revenue," signed by E. H. Batson, Deputy Commissioner, by B. S. Kimbrell, Head of Division, was sent to the Supervising Internal Revenue Agent, at New York:

"Reference is made to your letter of March 6, 1922, enclosing a waiver for 1915 and 1916 duly executed by Charles H. Sabin, 140 Broadway, New York, New York, and requesting that further extension until May 1 be granted for the purpose of securing the additional information desired by this office.

"Inasmuch as the taxpayer has executed waivers for 1915 and 1916, permitting a subsequent assessment of additional taxes found due for these years, it appears that the interests of the Government will not necessarily be jeopardized by such extension, which is hereby granted until May 1, 1922. It is desired, however, that the necessary information be submitted as soon as practicable after the date above designated."

XI. May 9, 1922, Revenue Agent Smith completed his reinvestigation and made a supplemental report recommending an additional tax of $52,942.59 for 1915, $450,451.75 for 1916, and $5,328.47 for 1918, and a refund of $13.56 for 1913, $103 for 1914, $93,382.56 for 1917, and $76.08 for 1919; the total of the additional tax being $508,722.81, and the total of the refunds recommended being $93,575.20, resulting in a net additional tax due of $415,147.61. This report was forwarded to the bureau at Washington on May 27, 1922, and a copy thereof was sent to plaintiff.

XII. The following letter dated October 27, 1922, was received by the Commissioner of Internal Revenue on November 1, 1922:

"I, Charles H. Sabin, hereby revoke and withdraw the consent and waiver, dated March 6, 1922, permitting the assessment of any and all taxes for the years 1915 and 1916, heretofore signed by me. I hereby also revoke and withdraw

any and all other consents or waivers heretofore, at any time, signed by me, or on my behalf.

"There was, and is, no consideration whatever to support the same; both the commissioner and taxpayer did not consent in writing to such waiver or waivers; such waiver or waivers do not comply with the provisions of section 250 (d) of the revenue act of 1921; such waivers or consents are null, void, and of no effect.

"I do hereby protest against the assessment of any and all tax or taxes for the years 1915 and 1916. The assessment of any tax or taxes is barred by the Statute of Limitations.

"Yours, very truly,

"(Signed) CHARLES H. SABIN,

"By MATTHEW T. MURRAY, JR.,

"*Attorney in Fact.*"

Accompanying the foregoing letter was a power of attorney duly authorizing said Matthew T. Murray, jr., to act as attorney in fact for Charles H. Sabin, the plaintiff.

XIII. On November 11, 1922, the following letter from the commissioner's office was addressed to plaintiff's attorney in fact at 140 Broadway, New York, and signed by B. S. Kimbrell, Head Personal Audit Division, Bureau of Internal Revenue, by A. H. Lewis, Chief of Section:

"Receipt is acknowledged of a power of attorney of Charles H. Sabin, dated October 27th, 1922, transmitted with your letter of October 27th, 1922, in which you, as his duly authorized representative, seek to revoke and withdraw the consent and waiver dated March 6th, 1922, previously signed by him agreeing to the assessment of any and all taxes for 1915 and 1916.

"You will be advised further relative to this matter by a later communication by this office."

XIV. November 21, 1922, a letter headed "Treasury Department, Office of Commissioner of Internal Revenue," and signed by E. H. Batson, Deputy Commissioner, was written and mailed to Matthew T. Murray, jr., plaintiff's attorney in fact, as follows:

"Reference is made to your letter dated October 27, 1922, receipt of which was acknowledged November 11, 1922, relative to the waiver signed by Mr. Charles H. Sabin.

"You are advised that this office is perfectly satisfied with the form and substance of the waiver in question, and hereby refuses your request to revoke and withdraw the same."

Reporter's Statement of the Case

XV. At the time of the filing of the instrument dated October 27, 1922, in which plaintiff by his attorney in fact undertook to revoke and withdraw the consent and waiver of March 6, 1922, as set forth in Finding XII, the commissioner had not affixed his signature to the instrument dated March 6, 1922, as set forth in Finding VI, signed by the plaintiff in which he consented to the assessment of any and all taxes found to be due for 1915 and 1916 and waived any statutory limitation as to the time such taxes should have been assessed. The commissioner's signature was placed on this instrument on or about November 15, 1922; subsequent to the filing of the instrument dated October 27, 1922, set forth in Finding XII, relative to the revocation of the waiver the plaintiff filed no agreement or consent to a later determination, assessment, or collection of an additional tax for 1915 and 1916.

XVI. After October 27, 1922, and at all times herein mentioned, plaintiff protested to various officers of the Bureau of Internal Revenue both the assessment and collection of such tax for 1915 and 1916 on the sole ground that it was assessed and collected after the expiration of the period of limitation.

XVII. June 6, 1923, the following letter headed "Treasury Department, Office of Commissioner of Internal Revenue," and signed by E. W. Chatterton, Deputy Commissioner, mailed to plaintiff was as follows:

"A reaudit of your individual income-tax returns for the years 1915 and 1916 in connection with the report of the supervising internal-revenue agent at New York, New York, dated April 30, 1918, and supplemental report dated May 27, 1922, discloses an additional tax liability of $334,756.84, summarized as follows:

1915 additional tax	$52, 942. 59
1916 additional tax	281, 814. 25

"The revenue agent's supplemental report has been accepted by this office as submitted, except as follows:

"For 1916 the amount of $1,124,750.00, representing profit on exchange of stock, has been eliminated from the taxable income in accordance with the provisions of article 1566 of regulations 62.

"You are advised that the legal department of this office has held that the waiver filed by you consenting to the as-

sessment of any additional taxes for the years 1915 and 1916 can not be revoked since the acceptance of the waiver by the deputy commissioner was in legal contemplation the act of the commissioner.

"In accordance with the provisions of section 250 (d) of the revenue act of 1921 you are granted thirty days within which to file an appeal and show cause or reason why this tax or deficiency should not be paid. No particular form of appeal is required, but if filed it must set forth specifically the exceptions upon which it is taken, shall be under oath, contain a statement that it is not for the purpose of delay, and the facts and evidence upon which you rely must be fully stated. The appeal, if filed, must be addressed to the Commissioner of Internal Revenue, Washington, D. C., for the specific attention of IT:PA:FR-LHD-704, and will be referred to the income tax unit before transmittal to the agency designated for the hearing of such appeals.

"You may, if you desire, request a conference before the income tax unit in connection with the appeal, to be held within the period prior to the expiration of five days after the time prescribed for the filing of the appeal. If the income tax unit is unable to concede the points raised in your appeal, it will be transmitted, together with the recommendation of the income-tax unit, to such agency as the commissioner may designate for final consideration."

XVIII. August 15, 1923, the commissioner assessed an additional income tax of $52,942.59 against plaintiff for the calendar year 1915 and $281,814.25 for the calendar year 1916.

XIX. September 6, 1923, the collector of internal revenue made demand for payment within ten days of the total sum of $334,756.84 as additional tax for 1915 and 1916 so assessed. Pursuant to this demand, plaintiff paid $214,-745.74 in cash under protest on November 15, 1923. Collection of the balance was effected by crediting $67,068.51 of the 1918 overpayment to the 1916 tax on March 17, 1924, and $26,314.05 of the 1918 overpayment and $26,628.54 of the 1917 overpayment to the 1915 tax on April 29, 1924.

XX. A warrant of distraint was issued December 7, 1923.

XXI. Plaintiff at no time filed a claim in abatement or bond for the years 1915 and 1916.

XXII. January 31, 1925, plaintiff duly filed a claim for refund and this claim was rejected by the commissioner

October 10, 1925, said rejection appearing on Schedule IT-4006, dated October 8, 1925.

XXIII. April 15, 1927, plaintiff filed a claim for refund of $52,942.59 paid as additional tax for 1915, and, at the same time, filed a claim for refund of $281,814.25 paid as additional tax for 1916. At the time of filing the petition herein on November 2, 1928, the Commissioner of Internal Revenue had not decided these claims.

The court decided that plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The tax in controversy is for 1915 and 1916. There is no controversy as to the correctness of the amounts collected. The issues relate entirely to the statute of limitation.

Plaintiff contends (1) that the instrument executed and filed by him March 6, 1922, did not constitute a valid consent or waiver under the provisions of section 250 (d) of the revenue act of 1921, 42 Stat. 265, for the reason that such instrument was withdrawn and revoked by him prior to the date it was signed or agreed to in writing by the Commissioner of Internal Revenue; (2) that even if this instrument of March 6, 1922, be held to constitute a valid consent agreement under the revenue act of 1921, both the assessment and collection of the additional tax at the time made were illegal because they were made at an unreasonable time after notice of revocation and withdrawal was given by plaintiff; (3) that even though the instrument of March 6, 1922, constituted a valid consent agreement under the statute, it did not confer upon the commissioner any rights with respect to the tax for 1915 for the reason that the statute of limitations for that year had expired prior to the execution of the consent and, further, the waiver related to taxes due for 1915 "under the act of Congress dated September 8, 1916"; (4) that even if the assessment of the tax was not barred, collection thereof was barred because there was no waiver of the period of limitation with respect to collection; (5) that the allowance of the claim for refund filed by plaintiff is authorized under the provisions of section 607 of the revenue act of 1928.

Opinion of the Court

On the first issue we are of opinion that the waiver was valid. It appears that prior to the time when the matter of the waiver now in controversy arose an investigation and report had been made to the commissioner by the field agents and that in connection with consideration thereof and audit of plaintiff's returns for the years involved by the commissioner he had directed the field agents to secure additional information from the taxpayer; that the agent had gone about such additional investigation whereupon the secretary of the plaintiff, who apparently had the entire matter in charge and was responsible for the compilation of necessary information required by the commissioner, advised the revenue agent on February 9, 1922, that it "has been practically impossible for me to compile the data requested"; that the reorganization of the Guaranty Trust Company had deprived him of the services of his assistants, making it necessary that he give the tax matter his personal attention; that it was necessary for him to go over numerous records from 1913 to 1916, inclusive, running into thousands of different accounts, and that it was impossible for him to find time enough to give sufficient attention to the matter. For these reasons a request on behalf of plaintiff was made for an extension to May 1, 1922. Presumably the agent transmitted this request to the commissioner. Later, on March 6, 1922, after a conversation on that date between the revenue agent at New York and the plaintiff's secretary with reference to the tax matter, the plaintiff signed a waiver which was addressed to the Commissioner of Internal Revenue, and, on the same day, plaintiff's secretary forwarded this waiver to the investigating revenue agent with a letter signed by him stating as follows:

"Agreeable to your conversation this morning, I am sending you herewith waiver signed by Mr. Sabin, waiving any statutory limitations in connection with taxes which may be found due for 1915 and 1916, together with a copy of my letter dated February 9, requesting an extension to May 1 for the additional information which the department has requested."

In this letter the agent was requested to take the matter up with Washington and "advise me as soon as possible

whether it will be agreeable for them to grant this extension as requested." This letter and the waiver were forwarded to the commissioner's office at Washington.

On March 9, 1922, before these papers reached the attention of the Bureau of Internal Revenue at Washington, the commissioner's office wrote plaintiff with reference to the tax liability for the years involved and enclosed waivers of the statute of limitation. The provisions of these waivers are not disclosed by the record. Upon receipt of this letter by plaintiff, his secretary wrote the Deputy Commissioner of Internal Revenue who had signed the aforementioned letter in which he stated—

"Replying to your letter of March 9, would advise that Mr. Sabin signed waiver, as per the enclosed copy, on March 6, waiving statutory limitation in connection with additional taxes that might be found due for the years 1915 and 1916.

* * * * *

"Should this waiver not prove entirely satisfactory, if you will kindly have same returned, I will substitute waivers as enclosed in your letter."

This letter was received by the Bureau of Internal Revenue on March 10, 1922. Thereafter, on April 8, 1922, the office of the Commissioner of Internal Revenue in a letter signed by the deputy commissioner acknowledged receipt of the waiver and of the letter offering to execute the waivers sent to the taxpayer by the bureau if the one of March 6 was not satisfactory and advised plaintiff that the original waiver had been received and was with the case. This was sufficient advice from the commissioner's office that the waiver had been accepted. On the same date the office of the Commissioner of Internal Revenue in a letter signed by the deputy commissioner addressed to the supervising internal revenue agent at New York, who had theretofore been directed to make an additional investigation, advised the supervising agent that the plaintiff had executed a waiver and that as "the interests of the Government will not necessarily be jeopardized" by the extension requested, the same was granted to May 1. Thereafter the matter proceeded in the usual way until November 1, 1922, six months after the revenue agent had completed his

investigation and had furnished the commissioner with the additional information requested, when the plaintiff by his attorney in fact undertook to withdraw and revoke the waiver of March 6, 1922. On November 21, 1922, the commissioner's office in a letter signed by the deputy commissioner advised plaintiff's attorney in fact that that office refused the plaintiff's request to revoke and withdraw the waiver. At the time of the attempted revocation of the waiver the commissioner's signature had not been placed upon the same. On June 6, 1923, the commissioner advised plaintiff of the result of his audit of the returns for 1915 and 1916 and granted him a right to appeal from such determination. No appeal was taken and the additional tax so determined was assessed August 15, 1923. Demand for payment was made by the collector on September 6, 1923. A portion of the additional tax was paid November 15, 1923, and the balance was satisfied by credit made by the commissioner in March and April, 1924.

On the first contention of the plaintiff we are of opinion that there was a sufficient consent in writing under the statute by the taxpayer and the commissioner prior to the attempted revocation by the plaintiff. The statute does not require that a consent, in order to be valid, must be in one instrument or that it shall be in any particular form. All that is required is that the consent be evidenced in writing. It is admitted by all that the plaintiff agreed in writing, but it is contended on behalf of the plaintiff that the commissioner did not do so before the taxpayer revoked his consent. The letters from the commissioner's office of April 8 to the plaintiff and, on the same day, to the internal revenue agent at New York relating specifically to the waiver constitute a sufficient consent in writing by the commissioner to satisfy the requirements of the statute. The statute requires no more than that there shall be written evidence of the fact that both parties understand that the limitation period specified in the statute is not to govern the matter and, therefore, that when a date to which the period has been extended is specified there shall be a complete understanding about it. No date was specified in the waiver in this case but the writings

Opinion of the Court

leave no doubt as to the understanding of the parties that the period specified in the statute was not to control. It is further insisted on behalf of plaintiff that there was no consent in writing because neither the waiver executed by the plaintiff in the form of a letter addressed to the commissioner nor the letter to the plaintiff by the supervising internal revenue agent at New York was signed by the commissioner or bore his signature. But we think when the manifold duties of the commissioner, the magnitude of the operations of the Bureau of Internal Revenue of which he is the administrative head, the vast amount of work involved and the procedure necessary to the determination and assessment of taxes, the great number of cases considered, and the amount of correspondence and notices to be had in connection therewith, are considered that letters such as are herein involved which were from the office of the Commissioner of Internal Revenue concerning matters relative to which clearly the Deputy Commissioner of Internal Revenue had authority to act for the commissioner and in his name, it should not be said that the commissioner has not acted. It would perhaps have been better had the commissioner's name appeared on the letters, for the controversy on this point might then have been avoided, but in our opinion when a letter or writing proceeds from the office of the Commissioner of Internal Revenue relative to a waiver and showing that such waiver is accepted, even though such letter is not signed in the commissioner's name but by the deputy commissioner, it is sufficient under the statute to constitute a consent by the commissioner. The deputy commissioner had authority to act for the commissioner. There is nothing to show that the commissioner did not direct or approve that which was done. It is presumed that public officials act correctly in accordance with the law and their instructions until the contrary appears. *C. M. & St. P. Ry. Co.* v. *United States*, 244 U. S. 351. And, therefore "* * * There is a presumption that, when an order is sent out from the appropriate executive department in the regular course of business, such order is with the knowledge and approval of the Secretary, unless the contrary appears." *Roxford Knitting Co.* v.

Moore & Tierney, Inc., 265 Fed. 177. See also *Wilcox* v. *Jackson*, 13 Pet. 498; *Williams* v. *United States*, 1 How. 290.

The letters to the taxpayer and to the supervising agent in charge with reference to the waiver went out from the commissioner's office in the regular course of business. Since there is no evidence that they were not written with his knowledge and approval, it must be presumed that they were properly authorized and the same effect must therefore be given them as if signed by the commissioner or in his name.

We are of opinion that there is no merit in the second contention of the plaintiff that the assessment and collection of the tax was illegal because made at an unreasonable time after notice of revocation and withdrawal of the waiver by plaintiff. No arbitrary period can be regarded as a reasonable time in every case. What a reasonable time would be in any case is a matter of proof. There is no proof in this case that the determination, assessment, and collection of the tax in question were not made with all reasonable dispatch. It has been held that the commissioner acted within a reasonable time when a longer period than is involved in this case had elapsed. *Cunningham Sheep & Land Co.*, 7 B. T. A. 652. *Wm. S. Doig, Inc.*, 13 B. T. A. 256.

Plaintiff's next contention is that the commissioner had no authority under the waiver to assess and collect any tax for 1915 because the statutory period of five years from the time the return was filed expired before the waiver was executed, and, further, because the waiver related to taxes due for 1915 " under the revenue act of 1916 " when no tax for such year was imposed by such act. The waiver was voluntarily executed by plaintiff without any representations by or on behalf of the commissioner. He was fully aware of the provisions of the statute and acted with knowledge of his rights in the premises. There is nothing in the statute that precludes the taxpayer from agreeing not to take advantage of the statute of limitation. When he does so freely, voluntarily, and without any misrepresentation on the part of the Government he ought not later to be permitted to repudiate such agreement and plead the bar of the statute. We are of opinion that under the waiver in this case

the commissioner had a right to assess and collect the tax for 1915. *Chas. H. Stange* v. *United States*, 68 C. Cls. 395, decided November 4, 1929. *Wells Bros. & Co.*, 16 B. T. A. 79. The fact that the waiver referred to the revenue act of 1916 does not render it invalid as to 1915. The subject matter of the instrument was the statute of limitation as to the years 1915 and 1916. The reference to the act of September 8, 1916, follows mention of the taxable year 1916 and it does not thereby necessarily follow that the taxpayer intended to waive only the statute in respect of the taxes imposed by that act. He is presumed to have known that the 1916 act imposed no tax for 1915. Furthermore, it is clear from the instrument that it was the statute with reference to the year 1915 that he was waiving and the mention of the act of 1916, which did not relate to that year, did not invalidate the waiver.

Finally it is contended by plaintiff that even though the waiver was valid and the assessment of tax was not barred, the commissioner had no authority to collect because there was no mention in the waiver of collection. We are of opinion that the waiver was intended to give and did give the commissioner the right to collect whatever tax might ultimately be found to be due. See *Roy & Titcomb, Inc.*, v. *United States*, 39 Fed. (2d) 753 [69 C. Cls. 614]. *Solomon* v. *Heiner*, D. C., W. D. Pa., June 28, 1930, Vol. I, 1930 P-H Fed. Tax Service, Para. 1301. In this case it is shown that the matter of plaintiff's tax liability and the waiver was handled by his secretary who apparently prepared the waiver or had it prepared for the plaintiff to sign. In his letter of February 9 he stated that he was giving the matter his personal attention and in his letter of March 6 forwarding the waiver he stated that he was sending therewith waiver signed by Mr. Sabin waiving any statute of limitation in connection with taxes which might be found due for 1915 and 1916. It is clear from this that it was considered by those in charge of the matter, both for the taxpayer and the Government, that the waiver should include all of the provisions of the statute of limitation with reference to the tax for the years mentioned and there is no proof that the plaintiff intended otherwise when he executed

it. In these circumstances we think the waiver for the time of assessment included the matter of collection.

Plaintiff is not entitled to recover. The petition must be dismissed and it is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear and took no part in the decision of this case.

BEN S. GANTZ v. THE UNITED STATES

[No. J-546. Decided October 20, 1930]

On the Proofs

Navy pay; joint service pay act of June 10, 1922; promotion without reduction of pay; amendatory act of May 23, 1928; construction of provisos.—(1) The second proviso ("that no back pay or allowance shall accrue by reason of the passage of this act"), of the act of May 23, 1928, amending the joint service pay act of June 10, 1922, is not inconsistent with the first proviso ("that this amendment shall be effective from July 1, 1926") and applies only to pay or allowance back of July 1, 1926. A lieutenant commander of the Navy, paymaster, promoted from the rank of lieutenant, passed assistant paymaster, October 29, 1926, with less than 14 but more than seven years' service, having commissioned service equal to that of a lieutenant commander of the line drawing the pay of the fourth period, and from and after July 1, 1926, receiving the pay of the fourth period under the act of June 10, 1922, was entitled from and after October 29, 1926, to the same pay he was receiving prior thereto.

(2) It was not intended by the joint service pay act of June 10, 1922, to reduce the pay and allowances of an officer upon his promotion, below that which he was receiving at the time of such promotion.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *King & King* were on the brief.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant. *Mr. Charles F. Kincheloe* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff accepted appointment as assistant paymaster, with rank of ensign, United States Navy, January 26, 1916, and has served continuously in the Navy since that date. He was promoted to lieutenant, junior grade, permanent, on July 30, 1918. April 7, 1921, he was regularly commissioned a passed assistant paymaster with the rank of lieutenant, and October 29, 1926, paymaster with the rank of lieutenant commander, which office and rank he still holds.

July 1, 1926, he had completed 10 years 5 months and 5 days commissioned service.

II. June 30, 1926, he was receiving the pay of the third period as a lieutenant of more than seven years' service in the Navy. From July 1, 1926, he received the pay and allowances of the fourth period as defined by section 1, par. 5, of the act of June 10, 1922, 42 Stat. 626, by reason of having commissioned service equal to that of a lieutenant commander of the line of the Navy, to wit, Lieut. Commander Ralph E. Davison, drawing the pay of that period from July 1, 1922.

It was decided, however, by the Comptroller General that from and after October 29, 1926, when plaintiff was promoted and accepted the appointment to the grade of lieutenant commander, he lost all benefit of the fourth-period pay and allowances and reverted to the third-pay period. He was paid only as in the third-pay period from October 29, 1926, to May 22, 1928. From and after May 23, 1928, he received the pay of the fourth period in accordance with the terms of the act of Congress of that date, 45 Stat. 719.

If entitled to be paid as an officer in the fourth-pay period from October 29, 1926, to May 22, 1928, plaintiff is entitled to judgment of pay and allowances of the fourth period in the amount of $1,556.61.

The court decided that plaintiff was entitled to recover.

Opinion of the Court

LITTLETON, *Judge*, delivered the opinion of the court:

The joint service pay act of June 10, 1922, 42 Stat. 625, adjusting the pay and allowance of commissioned and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, and other services provided that the pay of the fourth period should be $3,000 and that the pay of this period should be paid to "lieutenant commanders of the Navy, and officers of corresponding grade who have completed fourteen years' service, * * * and to lieutenants of the Staff Corps of the Navy, and lieutenants and lieutenants (junior grade) of the line and Engineer Corps of the Coast Guard whose total commissioned service equals that of lieutenant commanders of the line of the Navy drawing the pay of this period. The pay of the third period [$2,400] shall be paid to * * * lieutenant commanders of the Navy, and officers of corresponding grade who are not entitled to the pay of the fourth, fifth, or sixth period; to * * * lieutenants of the Navy, and officers of corresponding grade who have completed seven years' service, * * *."

Section 16 of this act provided "That nothing contained in this act shall operate to reduce the pay of any officer on the active list below the pay to which he is entitled by reason of his grade and length of service on June 30, 1922; * * * and nothing contained in this act shall operate to reduce the total of the pay and allowances which any enlisted man of the Army, Navy, Marine Corps, or Coast Guard is now receiving during his current enlistment and while he holds his present grade or rating."

Plaintiff contends that under this act he was entitled to continue to draw his pay and allowances of the fourth-pay period upon his promotion to the grade of lieutenant commander. The defendant refused to continue to grant him the pay and allowances of the fourth period after his promotion, on the ground that only lieutenant commanders with fourteen years' service were entitled to pay for the fourth-pay period; that plaintiff, thereupon, was entitled only to the pay of the third period, and, since he entered the Navy in 1916, he would not have the necessary fourteen years' service and was, therefore, entitled only to the pay of the third period.

Opinion of the Court

We are of opinion that under the provisions of section 16, act of June 10, 1922, *supra*, plaintiff would be entitled to recover, for we think that it was not intended by that act to reduce the pay and allowances of an officer upon his promotion, below that which he was receiving at the time of such promotion. *United States* v. *Freeman*, 3 How. 556. *United States* v. *Babbit*, 2 Black 55. *United States* v. *Kirby*, 7 Wall. 482. *Oates* v. *National Bank*, 100 U. S. 239. *United States* v. *Farenholt*, 206 U. S. 226. *Denig* v. *United States*, 37 C. Cls. 395. *Terry* v. *United States*, 39 C. Cls. 353. *Cromwell* v. *United States*, 42 C. Cls. 432. *Bartlett* v. *United States*, 59 C. Cls. 192; 2 Comptroller General 59. Any doubt that might exist in this respect was removed by the act of May, 23, 1928, amending paragraph 5 of section 1, act of June 10, 1922. This amendment reads as follows:

"*Be it enacted*, *etc.*, That paragraph 5, section 1, of the act approved June 10, 1922 (Volume 42, Statutes at Large, chapter 212, page 626), entitled 'An act to readjust the pay and allowances of the commissioned and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service,' be, and the same is hereby, amended to read as follows: 'The pay of the fourth period shall be paid to lieutenant colonels of the Army, commanders of the Navy, and officers of corresponding grade who are not entitled to the pay of the fifth or sixth period; to majors of the Army, lieutenant commanders of the Navy, and officers of corresponding grade who have completed fourteen years' service, or whose first appointment in the permanent service was in a grade above that corresponding to second lieutenant in the Army, or who were appointed to the Regular Army to fill vacancies created by the increase of the commissioned personnel thereof in 1920; to captains of the Army, lieutenants of the Navy, and officers of corresponding grade who have completed seventeen years' service, except those whose promotion is limited by law to this grade and who are not entitled under existing law to the pay and allowances of a higher grade; and to lieutenant commanders and lieutenants of the Staff Corps of the Navy, and lieutenant commanders, lieutenants, and lieutenants (junior grade) of the line and engineer corps of the Coast Guard whose total commissioned service equals that of lieutenant commanders of the line of the Navy,

drawing the pay of this period': *Provided*, That this amendment shall be effective from July 1, 1926: *Provided*, That no back pay or allowance shall accrue by reason of the passage of this act."

This act was passed to obviate the injustice arising from the reduction thus made. It inserted the words "lieutenant commanders and" before "lieutenants of the Staff Corps," etc.

The report of the House Committee on Naval Affairs, No. 1126, was adopted by the Senate committee, Report No. 1104, 70th Congress, 1st session, which quoted its recommendation:

"It is obviously inequitable that officers should suffer such a substantial reduction in pay and allowances upon promotion to a higher rank. The amendment to the pay act carried in this bill will only permit these officers, and officers similarly affected in the Coast Guard, to continue at their previous rate of pay upon promotion, without authorizing any increase of that pay."

The defendant held that the act of May 23, 1928, amending the act of June 10, 1922, was effective only from the date of its passage and refused to give any effect to the proviso "That this amendment shall be effective from July 1, 1926," on the ground that the first and second provisos of the act were inconsistent and that the first proviso did not belong in the bill and had been inadvertently included therein. In this construction of the statute the defendant erred. Both of these provisos were in the act of May 23, 1928, as signed by the Speaker of the House of Representatives, the President of the Senate, and as approved by the President, and neither can be ignored by the court. In *Field* v. *Clark*, 143 U. S. 649, it was contended that an act as enrolled and as signed and published was different from that shown by the Journals of the two Houses of Congress to have been passed. The court said:

"The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two Houses of such bill as one that has passed Congress. It is a dec-

laration by the two Houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the Government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill thus attested, receives his approval and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State, and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States carries, on its face, a solemn assurance by the legislative and executive departments of the Government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated, leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution."

We must take the acts of Congress as we find them, without addition or diminution.

By the first proviso of the act of May 23, 1928, *supra*, the amendment was made effective from July 1, 1926, and by the second proviso it was enacted that no pay or allowances back of that date should accrue by reason of the passage of the act. Thus construed, the two provisos are harmonious, supporting, instead of contradicting, each other, and carry out the true and manifest intent of the whole act.

Plaintiff is entitled to recover, and judgment in his favor for $1,556.61 will be entered. It is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear and took no part in the decision of this case.

GLOBE GRAIN & MILLING COMPANY v. THE UNITED STATES

[No. C-1012. Decided November 3, 1930]

On the Proofs

Contracts; agreement with Food Administration; excess profits under milling and jobbing licenses; audit by Food Administration; finality.—Where plaintiff company, in order to secure a license to continue in the business of milling and jobbing, agreed to observe the rules and regulations of the Food Administration and abide by the result of an audit by the administration of its previous operations with the understanding that no claim for excess profits should be made by the administration until the matter was thoroughly discussed and understood, the relation created between the parties was contractual. The administration, being bound to act in good faith and make an accurate audit, was not entitled to withhold profits found under an audit so grossly inaccurate as to constitute bad faith. Plaintiff was not bound by the audit, and could recover so much of the profits as were not in fact excessive under the regulations.

The Reporter's statement of the case:

Mr. H. Stanley Hinrichs for the plaintiff. *Mr. Frank S. Bright* and *Bright, Thompson, Hinrichs & Warren* were on the briefs.

Mr. Assistant Attorney General Charles B. Rugg for the defendant. *Messrs. Charles F. Kincheloe* and *P. M. Cox* were on the brief.

The court made special findings of fact, as follows:

I. Plaintiff is a California corporation engaged in the operation of flour and feed mills, warehouses, and elevators, and carries on a grain and general merchandising business with principal place of business at Los Angeles, California.

II. After the passage of the act of August 10, 1917, 40 Stat. 276, known as the food control act, and acting under the authority contained therein, the President of the United States on August 10, 1917, issued an Executive order author-

izing and providing for the organization of the United States Food Administration. The Food Administration was subdivided into divisions caring for different branches of the food and feed trades. He appointed Mr. Herbert Hoover United States Food Administrator, authorized him to have subordinate assistants and employees, and conferred upon him the powers and authority given by the act, so far as the same applied to foods, feeds, and their derivative products, including the issuance, regulation, and revocation of licenses under the act.

III. The President authorized the creation of the United States Food Administration Grain Corporation as an instrument of the Food Administration to carry out the financial details of buying and selling wheat and various cereal commodities. Divided into a milling section and a coarse-grain section, with an enforcement division under direction of R. W. Boyden, the United States Food Administration Grain Corporation functioned as the cereal division of the United States Food Administration.

The stock of the United States Grain Corporation, except the shares necessary to qualify seven directors, was all subscribed for and owned by the United States; the said directors' shares were held by the United States endorsed in blank.

IV. By proclamations issued August 14, October 8, 1917, and January 10, 1918, all persons, firms, corporations, and associations engaged in the business of manufacturing wheat flour and wheat mill feed, and mixed flours containing more than 50% of wheat flour, were required to secure licenses from the United States Food Administration. Applications for such licenses were made to the Food Administration, license division, Washington, D. C., on forms prepared for that purpose.

V. During 1917 and 1918 plaintiff owned and operated five flour and feed mills within the State of California, with an aggregate flour-mill capacity of 3,500 barrels of wheat flour per day of 24 hours. Two of the mills were located at Los Angeles, one at San Francisco, one at San Diego, and one at Colton. The largest mill, which was at San Francisco, had a capacity of 1,600 barrels of wheat flour per 24-hour day;

the smallest, which was at Colton, had a flour-mill capacity of 300 barrels per 24-hour day. Rolled barley, cereals, cleaned seed grain, cracked corn, poultry and stock feeds, and wheat-flour substitutes, as well as wheat flour, were manufactured at these mills. Elevators and warehouses were maintained at them. Feed and rice mills and elevators were owned and operated at six other California cities, where all products sold by the plaintiff were distributed to retailers and consumers. Distributing warehouses were maintained at still another six cities in California. At three other cities the products of the company were distributed through public warehouses. Offices were maintained by plaintiff in seven California cities, in addition to which it maintained offices at Salt Lake City, Utah, and at Portland, Oregon, as well as small offices at all of its distributing warehouses.

Plaintiff handled 29 different grains and from 125 to 150 other products, including lime, salt, lard substitute, macaroni, salad and cooking oils, fertilizer, hay and alfalfa, grain bags, etc. Its daily invoices were about 600 in number, and its sales ranged from 100-pound sacks to carload lots. Less than one-half of one per cent of its business was with jobbers and about 98 per cent of its business was with grocers and bakers. Its annual volume of business was approximately $25,000,000, more than 65 per cent of which was other than milling.

VI. On August 24, 1917, rules and regulations governing the conduct of flour millers operating under agreement with the United States Food Administration were promulgated by the Food Administrator, with the approval of the millers' committee, in order to facilitate the carrying out of the regulations and to effect a just distribution of wheat and its products. To assist the Grain Corporation in carrying out the terms of its agreement with the millers, the United States Food Administrator appointed a committee of the Food Administration composed of representative millers to be the milling division of the United States Food Administration, and this committee also served as a committee of the Grain Corporation.

VII. The rules and regulations promulgated by the United States Food Administration on August 24, 1917, provided that no miller might thereafter take any profits upon the distribution of milling flour and feed in excess of a maximum average profit of 25 cents per barrel on flour and 50 cents per ton on feed, and that "any profits in excess of the above profits are hereby determined by the United States Food Administrator, under the power vested in him by section 5 of the act of August 10, 1917, known as the food control act, and the Executive order of the President, dated August 10, 1917, creating the United States Food Administration, to be unjust and unreasonable."

The rules and regulations also required every miller to, before the 18th of each month, make a return upon oath to the Food Administrator, Washington, D. C., on forms to be furnished, showing profits earned during the preceding calendar month.

On the same date the United States Food Administration, through its milling division, issued a circular in explanation of the rules and regulations for the government of the milling trade, promulgated as aforesaid. This circular, among other things, contained the following:

"The word 'average' in connection with 'maximum profits' is used in recognition of the fact that varying rates of milling activity and variation in the returns derived from the sale of mill feeds, low grades, and clears makes it impossible to determine the true profit upon any specific sale of flour or feed or upon the output of a mill upon the basis of a short period of operation. The intent and spirit of the regulation is that no milling enterprise shall earn in the period of any crop year an amount in excess of 25c. per barrel on its production of flour and 50c. per ton on its output of offal.

* * * * *

"'Maximum profit 50c. per ton.' The influence on flour costs exerted by the returns received from mill feeds, the constantly fluctuating values of same, and inability to dispose of these commodities in direct relation to the production or sale of flour, may occasion some difficulty in establishing currently or on any individual sale of flour or feed the exact margin of profit involved in the transaction. The restriction of sales of both flour and feed to a thirty-day

basis tends to reduce these variations to a minimum, and every effort should be made to keep the profit on individual transactions within the maximum profits indicated.

"The rules and regulations of the Food Administration are designed to cover the manufacture and mill sale of flour and feed products. Where mills sell from the mill door, or from distributing depositories or warehouses on a retail or jobbing basis, the mills may have the option:

"(1) They may segregate their jobbing and/or retailing business from their regular milling business and secure in addition to the permissible milling allowance the increment of profit customary to such retailing or jobbing business; all accounting peculiar to such divisions must be kept separate and no item of expense incident to the retailing or the jobbing of flour or feed shall be included in the milling division; or

"(2) They may include all retailing or jobbing as part of the regular milling operation, in which event the expenses of retailing or jobbing may be properly charged as part of the milling costs, but the two operations must be construed together, and shall be limited to the single basis of profit designated for milling flour and feed; that is to say, the combined operations of milling, retailing, and jobbing will be considered as milling and the maximum limits of permissible profit will be based on the output of the mill."

On August 29, 1917, the United States Food Administrator issued a letter addressed to the millers of the United Sates in which he stated, among other things:

"In order to effectuate the greatest degree of accomplishment in securing the desired needs to the milling industry, the Food Administration has created a milling division to act in cooperation with the Grain Corporation in obtaining just distribution of wheat and its products. This milling division comprises a general committee with James F. Bell as chairman, general offices and headquarters in New York. There will be eight sectional branches each in charge of a divisional chairman, as specified in the flour-milling regulations of the Food Administration, inclosed herewith. The district committees will be familiar with the peculiar needs of each milling district, and will cooperate with the Grain Corporation in securing an equitable distribution of milling supplies. Under the plan outlined mills will be expected to proceed in the regular conduct of their business."

VIII. Thereafter other circulars, bulletins, pamphlets, and letters of instruction affecting the grain trade were issued at frequent intervals by the United States Food Ad-

ministration and the United States Food Administration Grain Corporation. They contained new, amended, and supplementary rules and regulations, interpretations of the rules and regulations, information of general interest to the trade, and suggestions for accounting systems and the manner of making the required reports. Copies of all circulars, bulletins, pamphlets, and letters herein referred to were received by the plaintiff.

IX. On August 24, 1917, the plaintiff applied to the United States Food Administration for licenses to manufacture, store, and distribute wheat and rye and their derivative products at its two Los Angeles plants. On August 27, 1917, it applied for like licenses for its San Francisco, Colton, and San Diego plants. Those applications were made upon forms supplied by the United States Food Administration and were in part as follows:

"The applicant agrees that in consideration of the issuance to it of the license hereby applied for, it will conduct its business in accordance with and will obey the rules and regulations which have been or which hereafter may from time to time be prescribed by the President of the United States, or by the United States Food Administrator, acting under the direction of the President, under the provisions of an act of Congress, entitled 'An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' approved August 10th, 1917.

"The license when issued may be revoked by said United States Food Administrator at any time in the event of the violation by the licensee, its agent or employees of any of the provisions of said act or any of said rules and regulations."

Pursuant to those applications the United States Food Administration, on September 5, 6, 7, and 8, 1917, issued its licenses M-0649, M-0768, M-0845, M-0846, and M-0939 for the plaintiff's mill A and Alameda Street mill plant at Los Angeles, its mill B plant at Colton, its mill F plant at San Diego, and its mill C plant at San Francisco, respectively, to operate plants for the manufacture, storage, and distribution of wheat and rye, and their derivative products.

X. On September 8 and September 22, 1917, plaintiff addressed letters to its several mills, instructing them in detail on the subject of accounting changes to be made in their books to conform to the requirements of the Food Administration.

XI. On October 5, 1917, the plaintiff entered into an agreement with the Food Administration—

"To observe the rules and regulations enacted or promulgated by the said Food Administrator for the government of the milling trade, under the date of the 24th day of August, 1917, and any modifications thereof that may be made with the approval of the committee named in said regulations."

This agreement is annexed to plaintiff's petition herein, as Exhibit C, and is made a part hereof by reference.

XII. On October 10, 1917, a further agreement was entered into between plaintiff and the Food Administration Grain Corporation, effective as of September 10, 1917, whereby plaintiff agreed that in purchasing wheat it would observe and respect and be governed by all rules and regulations which the said Grain Corporation might from time to time enact and promulgate, and whereby the Grain Corporation guaranteed the miller against loss by decline in value of all accumulated surplus of unsold wheat bought in accordance with the Grain Corporation's regulations and flour ground therefrom, and in consideration of which plaintiff agreed to pay the said Grain Corporation a fee equal to one per cent on all wheat purchased by plaintiff at a price level based upon that fixed by the price commission established under the authority of the Food Administrator, or purchased under the direction of the Grain Corporation, and used by the miller for milling purposes (exclusive of grain bought to fill existing contracts).

This agreement is annexed to plaintiff's petition herein as Exhibit D and is made a part hereof by reference.

XIII. On October 24, 1917, supplementary instructions governing the licensing and operation of wheat-flour distributors, wholesalers, retailers, brokers, mill agents, blenders, reconditioners, etc., where such businesses were operated as a part of a flour-milling business or auxiliary thereto, were promulgated by the Food Administration through its

milling division, effective November 1, 1917, which were in part as follows:

"Where wheat-flour millers, prior to the regulation of milling by the United States Food Administration, milling division, conducted their wheat-flour milling, jobbing, retailing, etc., business as a unit, but have since that time separated the jobbing, retailing, etc., business from the wheat-flour milling business and now conduct such business separately, either through a separate organization or by the separation of accounts and records, they or the separate organization must be licensed by the United States Food Administration, license division.

"Where such separation as described in paragraph (a) above has been created, the combined milling, jobbing, retailing, etc., business may not be conducted at a profit in excess of wheat-flour milling profit permitted under the rules and regulations governing wheat-flour milling, plus such reasonable jobbing, retailing, etc., profit as may prevail with independent jobbers, retailers, etc., doing business under like conditions and licensed by the United States Food Administration, license division; and in any case the jobbing, retailing, etc., profit shall not exceed the profit allowed licensees under the control of the United States Food Administration.

"Licensees under these special regulations shall be required to make reports regularly each month and such other supplementary reports as may be required to the United States Food Administration, milling division. Such reports shall show the exact character of transactions, within the period covered, between the licensee and the associated wheat-flour milling business and shall further show the total profit of the licensee for the period and the profit per unit of wheat flour and of other mill products handled by such licensee."

XIV. On October 31, 1917, the plaintiff executed and transmitted to the United States Food Administration at Washington its application for a license to handle or deal in as a manufacturer and supplier of hotels and institutions and as a wholesaler or jobber the several commodities checked in the application. The items checked included wheat, wheat flour, rye, rye flour, barley, rice, dried beans, barley products, rice products, beans and peas for feed, linseed oil, cake and meal, sugar-beet products, baled hay, alfalfa, and straw, and animal by-products, etc. In this said application

the plaintiff designated its business as that of a flour miller and wholesaler of mill products, mixed feed, and hay.

XV. On October 30, 1917, the milling division of the Food Administration issued its Bulletin No. 16, advising all millers who were conducting jobbing businesses or who had jobbing departments in their milling accounts to apply to the Food Administration for application blanks for licenses as distributors of food products.

On November 2, 1917, plaintiff wrote a letter to the Food Administration in which it stated that it had separated its milling from its jobbing departments.

On November 3, 1917, plaintiff wrote the Food Administration at the San Francisco office, stating:

"We have wired you that our sales of flour are principally direct to the retailer, our distributing department acting as jobber. It is true that we sell some flour to wholesale grocers, but the percentage is extremely small. Owing to outside competition, we have never been able to make the wholesale grocer a price sufficiently below the price quoted direct to the retailer to make the sale of our flour profitable to him."

On November 13, 1917, the Food Administration wrote to plaintiff informing it that inasmuch as it was doing a jobbing business it should therefore apply for a license covering such activity, and stated that one set of necessary forms was being mailed.

On November 22, 1917, license G–31135 of the Food Administration was issued to plaintiff to handle the commodities checked on its application of October 31, 1917, in the manner indicated by such checks, that is, as manufacturer, as supplier of hotels and institutions, and as wholesaler or jobber.

XVI. The food-control period was from September 1, 1917, to June 30, 1918, and during that period plaintiff, in common with other licensees of the Food Administration, was required to submit reports to the Food Administration at designated intervals covering the various phases of its activities. The requested reports were from time to time prepared by plaintiff upon forms supplied to it by the Food Administration and were filed with the Food Administration.

XVII. On November 12, 1917, plaintiff transmitted to the milling division of the Food Administration of New York its monthly cost reports of its wheat-flour milling operations at its Los Angeles, San Francisco, and San Diego mills for the month ending September 30, 1917. The plaintiff's Colton mill was then in the course of reconstruction, owing to partial destruction by fire and was not in operation in September. Plaintiff's letter of transmittal stated that explanatory memoranda were attached to each report to indicate the method adopted in compiling it.

On December 5, 1917, plaintiff transmitted to the Food Administration at Washington a similar report for its same mills for the month ending October 30, 1917, and in its accompanying letter informed the Food Administration that its Colton mill was still under reconstruction, owing to fire damage. Explanatory memoranda similar to those attached to the report for the month of September were attached to those for the month of October.

The reports filed by the plaintiff's several mills for the months September and October in each instance showed a profit of 25c. per barrel on the total barrels of flour and a profit of 50c. per ton on the total tons of wheat offal.

On February 13, 1918, plaintiff transmitted to the Food Administration at Washington its wheat-flour milling monthly cost reports covering the wheat-flour milling operations of its Los Angeles, San Francisco, and San Diego mills for the month ending December 31, 1917. Operations were resumed at the plaintiff's Colton mill on January 14, 1918.

On March 8, 1918, plaintiff transmitted to the Food Administration at Washington its wheat-flour milling monthly cost reports covering the wheat-flour milling operations of its Colton, Los Angeles, San Diego, and San Francisco mills for the month ending December 31, 1917. Wheat-flour milling costs reports showing the wheat-flour milling operations for the month of November, 1917, and for the months of February, March, and April, 1918, were filed by plaintiff. Each of these reports, as in the case of the September and October, 1917, reports, hereinbefore referred to, shows the tons of offal produced, the number of barrels of

flour produced, and a profit of 50c. per ton on the total tons of offal sold and a net profit of 25c. per barrel on the flour sold.

Between July 13 and November 17, 1918, plaintiff transmitted to the Food Administration at Washington all the consolidated profit and loss statements for its several mills for the seven months' period, September (1) 10, 1917, to March 31, 1918, inclusive, and for the three-months' period, April, May, and June, 1918. Those statements also contained summaries of wheat, flour, and feed for the same period. Under the columns for selling expense and general expense the plaintiff reported a segregation of its jobbing department. The consolidated profit and loss statements, as did the monthly statements, showed a profit of 50c. per ton on the total tons of all class of offal sold and a net profit of 25c. per barrel on all flour sold for the respective periods.

XVIII. Jobbers' monthly trading statements were filed by plaintiff for its jobbing business connected with its mills at Colton, Los Angeles, San Diego, and San Francisco for the months of November, 1917, to June, 1918, both inclusive. Those reports, as were the monthly reports, were required to be filled in and mailed to the Food Administration at Washington by the 18th of the month following the month's operations shown on the reports. With the exception of the reports for the month of June, 1918, the reports were all executed prior to June 30, 1918. Those reports purported to show the total sales during the month, the inventory values at the beginning of the month, purchases made during the month, inventory values at the end of the month, cost of sales during the month, cost of warehousing, operating, handling, delivering, and selling. The reports pertained to flour only and did not include other commodities.

XIX. All of the reports filed by plaintiff hereinbefore referred to were duly verified. The jobbers' monthly trading statements were made under jobbers' retailers' license No. G–31135. All of the other reports were made under milling licenses Nos. M–0649, M–0768, M–0845, M–0846, and M–0939, granted to plaintiff in September, 1917.

On November 27, 1918, the five remaining licenses were canceled and all of the activities at plaintiff's plants were consolidated under license No. G–31135.

Reporter's Statement of the Case

XX. On January 11, 1918, plaintiff wrote a letter to S. B. McNear, chairman of the South Pacific coast division of the United States Food Administration in San Francisco, inquiring whether certain rules promulgated December 18, 1917, applied only to the milling part of plaintiff's business, or included jobbing department, it being plaintiff's impression that they applied only to the manufacturing end of the business and did not cover the jobbing department, and stated further:

"If you will refer to milling division Circular No. 2, promulgated August 24th, 1917, page 11, line 32, you will find that permission was granted for the mills to segregate their jobbing business from their regular business, and to secure, in addition to the permissible allowance, the customary profit to such jobbing business. We have segregated our accounts to conform to this regulation and believe until we are otherwise officially advised that we should not consider that the rules and regulations, as prescribed by the milling division of the Food Administration, apply to our jobbing business. If we are correct in this understanding, we consider that we should proceed to charge to our jobbing department bran, mixed feed, etc., at the prices prescribed in Circular No. 6–B, and that our jobbing department would then be entitled to sell such products at a reasonable profit, but at not the fixed differentials per carload and less than carload lots, as prescribed in this bulletin."

On January 14, 1918, McNear answered plaintiff's inquiries as follows:

"Rules 17, 18, and 19 apply to all mills, whether they operate as a manufacturing mill with the jobbing department segregated or with the manufacturing and jobbing departments combined. The restriction on profits, whether you take the two departments separate or combined, will be based on what is a reasonable profit as evidenced by the three years previous. Inasmuch as you have segregated the business, such profits as you may make on the manufacturing end will be subject to the extreme measure of profit, i. e., 25 cents per barrel. This original maximum profit in the rules and regulations apparently is modified by the statement that profits should in no case exceed a reasonable profit.

"This same line of reason will apply to your jobbing department. There are certain parts of the jobbing department that heretofore you would have been satisfied to

operate on a basis of 50 cents per ton and there are other parts of this business, where credit was extended and quantity was small, where an additional margin was charged. In case of a branch office carrying certain small accounts, the expense of the business would probably be six to eight per cent, and I do not know but what ten per cent on such business would be considered fair.

"I think, however, you are working on a wrong theory. If your wholesale department has sold ahead your entire output, it is to be presumed that your manufacturing end would have no grind to offer; but if it was found your wholesale department was carrying a surplus stock of feed you would place yourself in the position of being criticized if some customer who is ready to buy in carloads and pay cash at the mill for the feed is denied the feed at the basis price of 38 per cent of the cost of the feed plus the cost of bags, etc.

"It seems to us if you forced that man to buy from your wholesale department at an increased price, then you would not be working within the rule.

"You are quite correct in stating that you should charge your jobbing department the prices fixed in the rules and that your jobbing department should be entitled to sell such products at a reasonable price."

XXI. On February 15, 1918, the Food Administration, through its milling division, issued its Bulletin No. 84, which was in part as follows:

"It is distinctly not permitted that a miller shall handle any of car-lot business through a jobbing department or sell to an auxiliary company, which company shall then resell at an added profit. All invoices for car-lot cash business must show the bulk mill price and add thereto the necessary items of expense incurred by the sale."

On February 16, 1918, immediately following its receipt of Bulletin No. 84, the plaintiff wrote the Food Administration as follows:

"We have your Bulletin No. 84, covering car-lot business, and as this is directly the opposite of our understanding of the regulations as they pertain to our milling and jobbing departments, we are writing to ask you if all the mills in the United States are to operate under Bulletin No. 84 or if this bulletin applies only to mills in division No. 9.

"It has been our understanding heretofore that the mill could sell all of its products to the jobbing department, and that the jobbing department could then sell such products

at a reasonable profit. We have a letter dated January 22d, from the New York office of the Food Administration, in which they advise that our jobbing department is not affected by Circular No. 6–B, Form 1199–B, Series B, explanation of rules 17, 18, and 19, promulgated December 18th, 1917. Further, that our jobbing department may sell feed at a legitimate profit to itself, and that the above circular was addressed especially to wheat-flour millers.

"Are we to now understand that a ruling has been promulgated by the New York office of the Food Administration in which the jobbing department is limited only to the sales of less than carloads of flour and feed? If such is the case and this ruling is sustained we will be obliged to again segregate our business and apportion to our cost of manufacturing a percentage of the clerical, selling, administrative, and all other expenses now charged to our jobbing department. You will appreciate the additional work this will entail and at the best it will be only an estimate. Our milling department is not now charged with any portion of our selling expenses, and you will agree with us that carload commodities will not sell themselves.

"Is it not possible to have Bulletin No. 84 suspended temporarily until the Food Administration can determine what a tremendous additional expense and confusion this will cause to those mills who are now operating a jobbing department?"

On February 21, 1918, the divisional manager of the south Pacific coast division of the United States Food Administration wrote the following letter in response to plaintiff's letter of February 16th:

"Referring to your letter of the 16th inst. on the subject of our Bulletin No. 84, for your information, these instructions have been sent out to all mills in the United States.

"For the present, in view of your New York letter of the 22nd ult., the suggestion is made that you maintain your jobbing department as heretofore. In the meantime we will look into the matter further and advise you later if it is necessary for you to change your present methods in order to comply with the instructions contained in Bulletin No. 84."

Plaintiff was not required by the Food Administration to change its practice.

Plaintiff was duly and regularly licensed as a wholesaler and jobber, and, throughout the period here involved,

it was a *bona fide* jobber within the meaning of the Food Administration regulations. Its books were kept in the best possible manner and reflected the facts with reference to its transactions. The profits charged by plaintiff in its milling and jobbing business were reasonable and no excess profits were charged or made by it under its licenses and the Food Administration regulations.

XXII. On June 18, 1918, the Grain Corporation sent the following notice to millers, a copy being received by plaintiff:

"We beg to advise you that it has been determined that the agreement entered into between you and the Food Administration Grain Corporation shall be terminated at the close of business on Saturday, June 29, 1918, and we accordingly hereby notify you that said agreement shall cease to be in effect after said date and that the rights and obligations, if any, of the parties to said agreement shall then be ascertained and determined."

A copy of said notice is annexed to plaintiff's petition as Exhibit E and is made a part hereof by reference.

XXIII. In 1918 the cereal enforcement division of the United States Food Administration was organized. It began to function actively just before June 30, 1918, which was the end of the food-control period. That division was charged with the regulation and enforcement of the rules and regulations of the milling division of the Food Administration.

XXIV. Early in August, 1918, while on a tour of inspection of the larger flour mills of the Western States, John G. Dudley, an attorney and auditor attached to the division of enforcement of the Food Administration, accompanied by Charles W. Stewart, of Detroit, a certified public accountant, who was then employed by the United States Food Administration, called at the general offices of plaintiff at Los Angeles. The inspection tour of Dudley and Stewart had involved examinations of the records of the mills examined for the purpose of determining whether the rules and regulations of the Food Administration had been complied with, and whether the books of accounts had been so kept that the reports made could be verified,

and for the further purpose of determining whether profits in excess of those permitted by the Food Administration regulations had been taken. They spent the larger part of three days at Los Angeles in conference with officials of plaintiff corporation to determine whether plaintiff conducted a jobbing department.

XXV. On August 15, 1918, following the departure of Dudley and Stewart from Los Angeles, plaintiff addressed a letter to Dudley at San Francisco, in which it took issue with him upon his contention that plaintiff had no jobbing department, that the handling of flour and milling feed by the plaintiff in its capacity as mill manufacturer and flour jobber must be handled at not to exceed 25c. per barrel on flour and 50c. per ton net profit on feed, and further stated:

"Respecting the other contentions which have been verbally outlined by you, which have in view a change of our monthly production figures embracing a change in the yield of offal and an altered showing of screenings from wheat, we are of the opinion that you do not yet appreciate the fact that such screenings have never been charged to wheat, hence have not increased the value of same, as such screenings were not wheat pursuant to Federal inspectors' certificates, hence wheat would not be entitled to credit for same. On the other hand, as to our inventory of wheat offal on September 1st, we must take the position that with the segregation of our business between mill manufacturer and flour and feed jobber pursuant to regulations at hand, when this segregation was made we were not called upon to include inventory of wheat offal in the hands of our jobbing department in the mill operations for the period commencing with September 1st, 1917."

On August 16 Dudley replied to plaintiff's letter with the following telegram:

"Certified Public Accountant Stewart after further conference still maintains impossibility of determining exact cost of production and profits made on bona fide sales all wheat products or mixtures thereof during control period September first to June thirtieth. Your taking uniform milling profit twenty-five cents on flour and fifty cents on feed basically wrong and violation Food Administration agreement and regulation. Therefore useless attempt further examination records."

On the same date plaintiff telegraphed the following reply:

"We still maintain our accounts in proper condition and can be checked if our milling department and jobbing department are taken separately. Only inventory left in milling department on Sept. first was stock of wheat all flour and other products inventory Sept. first in jobbing department and when taken separately no trouble to check. If you and Mr. Stewart will return here we are perfectly willing to put our own accounting staff as well as outside public accountants, if necessary, at our expense under Mr. Stewart, or if Mr. Stewart can not stay, are you willing to accept certified figures of Marwick Mitchell Peat and Company or Clink Bean and Company? We know that we are performing the service of a legitimate jobbing department as we always have done and you admit we have performed the service. We feel that any audit will bear out our contention, as we have acted in the utmost good faith, and assure you that we have nothing to conceal."

On August 17th Dudley made the following reply:

"We are in substantial agreement regarding facts. Can not accept your interpretation of rules and regulations."

XXVI. On August 26, 1918, Dudley addressed a letter to Alfred Brandeis, chief of the division of enforcement, Food Administration, on the subject of operations of plaintiff company, and enclosed the following report of Charles W. Stewart:

"While we were in Los Angeles it was considered advisable to attempt a brief examination of the books of the subject company.

"We quickly discovered that the attitude of the officers and employees of this company was based on the assumption that the United States Food Administration, through its rules and regulations, intended flour millers to make a net profit of 25c. per barrel of flour produced above mill cost and 50c. per ton of wheat offal produced.

"Acting on that assumption, their accounting records are devised and maintained in a manner to show only the milling cost of production, the principal element of which, 'wheat grind,' is a theoretical figure based on a theoretical average yield. The accuracy of the other milling expenses, as reported, I have no reason to doubt without further and more detailed examination.

"As a further consequence of the above assumption, the Globe Grain & Milling Co. has proceeded on the theory that

the transfer of all their manufactured wheat products, including the by-product, offal, by a journal entry from manufacturing cost account to 'jobbing department' at a uniform profit of 25c. per barrel for flour and 50c. per ton for feed, constitutes a sale. This journal entry is made at the close of each month when the milling cost per barrel is determinable. Previous to food control this was not done.

"The subject company claims, further, that they are entitled to a jobbing profit over and above the milling profit on the ground that they have performed a jobbing service during, as well as before, the period of Food Administration control. *All* their flour sales are made through their so-called 'jobbing department.' All selling expense is borne by their so-called 'jobbing department.'

"Flour and feed sacks are carried by the so-called 'jobbing department.'

"On the decision of Mr. John G. Dudley, of the division of enforcement, that the procedure of the Globe Grain & Milling Co. does not constitute a 'jobbing department' under the rules and regulations of the U. S. Food Administration, we attempted to draw off from their records such statements as would determine the combined milling and 'jobbing department' profits.

"This we were unable to do, inasmuch as the company, proceeding upon the above-mentioned assumption, did not take an inventory of their wheat offal at each of the four mills operated by them in grinding wheat as of date September 1 (10), 1917. This item being an element of the cost of flour sold during the period of Food Administration control, and being undeterminable at this time with any degree of accuracy, it is impossible to make a true statement of their profits for the period from September 1 (10), 1917, to June 30, 1918.

"As a further consequence of their interpretation of the rules and regulations of the U. S. Food Administration, the Globe Grain & Milling Company claim to have rightfully made a profit in excess of 25c. per barrel on flour and 50c. per ton on feed.

"I am therefore of the opinion, by reason of the foregoing-mentioned facts and the further fact that there was no separation of wheat offal from the offal of other grains, and no weighing of the total finished wheat products or the weighing of wheat into the mill from the tanks or elevators, that it is impossible to accurately determine the profits which have been made upon sales during the first year of food control."

Dudley further stated that the process used by plaintiff in its bookkeeping operations might be properly determined by

pyramiding of profits from month to month; that the journal entries whereby transfers were made from plaintiff's milling department to its jobbing department was a device resorted to and used as a means of violating the law and rules and regulations; that no attempt was made at any time to actually segregate and separate plaintiff's wheat-milling operations from its operations in other grains; that plaintiff's monthly reports made during the period September, 1917, to February, 1918, inclusive, and its consolidated reports made for the months from September, 1917, to March, 1918, inclusive, did not reflect all of the milling operations of the company; and that the construction placed by plaintiff upon the law and rules and regulations promulgated therein for the governing of wheat-flour millers had been self-serving, deliberate, and intentional. In conclusion he stated that "No figures which can be taken at this time will ever accurately determine the profits which they have made, because it is impossible to determine the percentage of wheat offal which entered into the mixed feed milled, packed, and sold by this company."

On August 26, 1918, plaintiff received a telegram from Roland W. Boyden, chief of the enforcement division of the Food Administration, informing it that examiners of the enforcement division had reported important violations and evasions of food regulations in wheat milling after warnings from the milling division and that Friday, September 6th, at ten o'clock, at Washington, had been fixed as the day for hearing on the question of the revocation of plaintiff's license.

XXVII. Plaintiff in the meantime had called upon Marwick, Mitchell, Peat & Co., chartered accountants, to attend at plaintiff's offices at Los Angeles and San Francisco for the purpose of examining the methods adopted by the plaintiff's accounting department to record its milling and jobbing business in conformity with the requirements of the milling division of the Food Administration.

Marwick, Mitchell, Peat & Co. submitted their signed report to plaintiff on August 26, 1918. They state in their report that they have audited the balance sheets of the company annually for the past five years, and are therefore fa-

miliar with its business and operations and the changes made from time to time to improve its accounting system, particularly in the detailed operating accounts, in order to keep up with the most modern methods of accounting. This firm reported further that "the system of accounts adopted by the company to record the operations of its manufacturing and jobbing departments is efficient, comprehensive, and clear, and that the records have been modified, from time to time, so as to enable the information desired by the Food Administration to be obtained and verified with a minimum of trouble to the company and Government inspectors."

XXVIII. At the conclusion of the hearing before Boyden at Washington, on September 6, 1918, at which hearing Dudley, as well as O. H. Morgan, one of the plaintiff's vice presidents, and A. D. Buckley, secretary, were present, Boyden announced that he would designate an accountant to audit the plaintiff's books at the expense of the plaintiff with a view to ascertaining just what had been done.

XXIX. On September 16, 1918, Charles W. Stewart was given a certificate of appointment as auditor in the enforcement division of the Food Administration. On January 20, 1919, Stewart was instructed by the chief of the cereal enforcement division of the Food Administration to make an audit of plaintiff's records. The letter of instruction to him stated, in part:

"This work of auditing is to be performed by you with such assistants as you may deem desirable and necessary, and the entire cost thereof is to be charged to and paid by the Globe Grain Milling Company.

"We know, with the work on hand and mapped out, that it will be some considerable time before this work can be done by you personally, but it has occurred to the writer that you might, perhaps, be able to put accountants from your own office on this work and perhaps give them sufficient instructions by mail so that your own presence would not be constantly necessary at Los Angeles."

The audit was begun at Los Angeles during the first week of March, 1919. Stewart went to Los Angeles with three of his men and remained there for two and a half days before returning to Kansas City. The greater part of the work in connection with the audit was done by R. H.

Reporter's Statement of the Case

Garner and C. Van Maanen, each of whom was engaged on the audit for 103½ days, and by P. D. Hammett, who assisted Garner and Van Maanen during the first 42 days of the work. Garner, Van Maanen, and Hammett had, for several months prior to their assignment to the Globe Grain & Milling Co., been employed by the enforcement division in auditing flour mills' accounts to determine whether or not there had been any excess profits made in the manufacture and sale of flour and wheat offal.

On March 20, 1919, Stewart wrote from Kansas City, Mo., to Brandeis, at Washington, as follows:

"Los Angeles is so far distant from Kansas City that it is almost impossible for me to personally direct the work, so I took three of my best men, and I am pleased to state that they are making satisfactory progress. I am in daily communication with them. They have been instructed to keep duplicates of their expense accounts in order to bill against the Globe Grain & Milling Co. when the job is finished."

XXX. On April 29, 1919, Stewart tendered his resignation as an auditor of the Food Administration and his resignation was on the same date accepted. Soon after his resignation had been accepted Stewart recalled Garner and Van Maanen to Kansas City. They, too, resigned as employees of the enforcement division of the Food Administration and then returned to California as employees of Stewart's accounting firm of Stewart & Co. to complete the audit of the plaintiff company undertaken by them in March.

XXXI. On July 5, 1919, plaintiff addressed a letter to the Food Administration informing it that forms of certain licenses which it understood would be effective July 15th had not yet been received, and requested that the necessary forms be forwarded by return mail.

On July 8, 1919, the following telegram, signed "Food Administration Enforcements Brandeis," was received by plaintiff at Los Angeles:

"We are to-day wiring C. W. Stewart and Company in your care to give full access to all Government reports and correspondence of your company they may have in their possession to William Eldred, our official representative. He will call on you shortly and you are instructed to give him full access to all your record. We have instructed

Mr. Eldred proceed with an audit of your account independent of Stewart and Co."

On July 10, 1919, plaintiff sent the following telegram to Eldred at San Francisco:

"Our head office Los Angeles best place for you to start work. All data we have here, including books of our own reports to Government with supporting schedules, available at once. Will instruct Stewart's men to come to Los Angeles and place their records at your disposal. Have wired our San Francisco office to give you access to any papers in their possession. Any other action you desire please wire us. Bear in mind completion of audit is of utmost importance to us. We have no part in any difference between Food Administration and Stewart. Please wire when your men will arrive in Los Angeles and would appreciate if you could come personally to thoroughly understand our situation."

On July 11, 1919, plaintiff applied to the United States Wheat Director for licenses as a miller, as a warehouse or elevator operator, as a broker or commission merchant, and as a wholesaler or jobber.

A few days thereafter Eldred arrived in Los Angeles to begin his audit.

XXXII. On July 17, 1919, at the instance of Eldred and before he had made his audit, and in order to secure a license to continue in business, the president of plaintiff company wrote to the Food Administration as follows:

"Referring to conversation held this day with your Mr. Eldred at our Los Angeles office, in reference to the audit now being conducted and as it affects the issuance of licenses required under the regulations becoming effective July 15, 1919, we hereby agree to abide by the results of your audit of the books and records of this company covering the period of our milling operations September 1st or 10th, 1917, to June 30, 1918.

"It is understood between your senior auditor, Mr. Eldred, and ourselves that no claim for excess profits shall be made without first being thoroughly discussed and understood between Mr. Eldred and ourselves."

XXXIII. After he had examined the monthly cost reports and the jobber's monthly trading statements filed by plaintiff with the Food Administration for the period September 1, 1917, to June 30, 1918, hereinbefore referred to,

Eldred on July 25, 1919, prepared a letter to the president of the plaintiff company confirming a conversation that he had with him that day, which letter was, in part, as follows:

"Following the above rule, I find that on the original reports sent in by you to the Food Administration there is shown to be $38,901.31 excess profit, $4,474.42 one per cent fee due, as per the enclosed statements.

"Inasmuch as your original statements show the excess profit and which should have been liquidated before, I must now ask you to do so at once in order to place your name in good standing with the Food Administration before license can be issued. You will understand that where an agreement is accepted from the miller to abide by the result of an audit made by the Government auditors and to divest himself of any excess profit then found to have been made, necessarily only applies to such miller's reports whereon no excess profit appears, but when the original reports do show, as in your case, excess profits, it is obvious that such excess should be paid before a miller could expect to be reported in good standing."

Statement of excess profits attached to the letter showed that the sum of $38,901.31, estimated, was made up of the entire amount of the jobbing profits reported by the plaintiff for its Los Angeles and Colton mills on its reports to the statistical division of the Food Administration.

On July 28, 1919, the president of plaintiff company replied to Eldred as follows:

"This will confirm our agreement with you this date as follows in connection with the audit you are to conduct of our records in connection with our activities as licensed flour millers and flour jobbers, subject to the rules and regulations of the United States Food Administration as regulating both flour millers and flour jobbers as well as the subsequent interpretation of these rules:

"We herewith hand you check for $38,901.31, as demanded by you, with the understanding that you are to hold this check, and if, when you have concluded your investigation, you have decided that we have not profiteered, said check is to be returned to ourselves.

"It is also understood that we are giving you this check, as we have been refused a license from the Grain Corporation for the coming year until we have done so."

On that same date the following additional letter was delivered to Eldred by plaintiff, together with the check therein referred to:

"In accordance with demand made by you to-day, we herewith hand you our check for $4,474.42, same being 1% on the value of the wheat we had on hand at June 30th, 1918. As this wheat had not been ground by us at that date and our interpretation of the contract between ourselves and the Grain Corporation is that we are not to pay this 1% except on wheat actually ground into flour, we are paying this amount under protest."

Upon his receipt of those two letters and the check, Eldred sent the following telegram to the enforcement division of the Food Administration at Washington:

"Globe Mills now in good standing. Have deposited with me subject to result of audit thirty-eight thousand nine hundred and one dollars and paid one per cent fee, amounting to four thousand four hundred and seventy-four dollars. License may be safely issued."

On July 29, 1919, the plaintiff transmitted to the Merchants National Bank of Los Angeles, the bank upon which its check for $38,901.31 was drawn, a copy of its letter of July 28, 1919, to Eldred, which pertained to that check, and instructed the bank to refrain from cashing that check until it was so authorized.

XXXIV. On July 31, 1919, Eldred addressed a letter to plaintiff, in which he stated that he had just completed an examination of the seven months' and three months' reports sent in to the Food Administration by its Los Angeles mills. He stated that the "discrepancies (not to use a harsher term) revealed therein are so serious that I am constrained to bring them at once to your personal attention"; and also "In the 'building up' (again to use no harsher term) a report designed to show no excess profit and forcing a balance to do so may only be construed as an attempt to evade payment of excess profit." He further stated, "In the summing up of the corrections on your reports it shows a further balance of excess profit in the sum of $4,436.09, which I am in duty bound to ask you to liquidate, making your cheque payable to the U. S. Grain Corporation."

On July 29, 1919, W. H. Holliday, treasurer of plaintiff company, communicated with Boyden by telegram, complaining about the manner in which Eldred was proceeding

at Los Angeles. Boyden replied on August 1, 1919, in part, as follows:

"Have had merely nominal connection with Food Administration since April first, but will communicate your information with my indorsement on arrival Boston. Use this telegram as evidence Eldred that I was convinced you had genuine jobbing department long standing. I judge Eldred's difficulty not with this fact but probably due to necessity segregating jobbing account from mill account."

On August 2d plaintiff denied the charges made by Eldred in his letter of July 31, and denied having taken the additional excess profits in the sum of $4,436.09, as alleged, and it transmitted to Eldred a copy of Boyden's telegram of August first, and stated:

"I feel now that you will be perfectly willing to go into our books along the lines originally set down by Mr. Boyden, namely, that an examination of the accounts and the affairs of the company would be made to disclose the service we performed both as millers and as jobbers, and if we really performed the service that we would be given the benefit of the profits accorded to these activities, pursuant to the regulations under which we have operated."

On August 4 Eldred replied as follows:

"You will recall that in my letter I said that my conclusions were drawn only from the examination of the reports, but the inventory price of wheat as shown on report must stand at the same price as wheat charged thereon. Subsequent examination of your records will, no doubt, end in a new profit and loss statement. I am entirely willing to forego settlement of apparent excess until that is done."

XXXV. Garner and Van Maanen, as employees of Stewart & Co., continued their work on the audit of plaintiff's accounts until August 15, 1919, on which date they completed their final report, and in their conclusions stated:

"Summing up, we may conservatively state that the actual net profits realized by the Globe Grain & Milling Company on the milling and jobbing of wheat products during the period of control did not exceed $60,000, as against an allowable profit of $177,969.77.

"We find the accounts and records of the company are arranged in accordance with modern principles and are well kept. Any information desired may be easily obtained therefrom.

"An excellent accounting department is maintained which assisted us in every possible way. From the correspondence examined and the numerous instructions issued to branches it is evident that the accounting department made an exhaustive study of all regulations promulgated by the U. S. Food Administration and spent much time and effort to comply with the spirit and letter of the rulings of the administration."

This report of Stewart & Co. is annexed to plaintiff's petition as Exhibit G and is made a part hereof by reference.

The cost of this audit was paid by plaintiff.

XXXVI. On August 30, 1919, license No. 031199 EGHMYE was granted to plaintiff by Julius H. Barnes, United States Wheat Director, to engage in and carry on the business in wheat and/or wheat flour specified in licensee's application for license to the United States wheat director.

XXXVII. On September 2, 1919, plaintiff wrote to Boyden transmitting a copy of the Stewart & Co. audit, and on September 9, 1919, Boyden replied as follows:

"I think Dudley was entirely right in his first view. The rule did not allow 25c. per barrel, but 25c. was the maximum, the rule being in substance that the miller was to be limited to a reasonable profit not to exceed 25c. That being the case, there was no justification for transferring everything to the jobbing department at a 25c. profit; and this is what I had in mind when I spoke of a device at the time of the hearing.

"In our final audits we have, I believe, made no question as to profits not exceeding 25c. This concession was a result of a compromise with the mills. We had a lot of discussion with Mr. Bell, of the milling division, and with representatives of the millers' associations as to various details of the auditing, and finally reached a pretty definite understanding as to the whole thing. For the purpose of avoiding ill feeling we made a number of concessions, of which this was one.

"So in the practical application in the latter period the miller was allowed 25c. I had not before considered this change in its special application to your case, but looking at it now, I should say that in view of the change we would regard your adoption of the device as an immaterial fact, and would endeavor to ascertain and pass on your profit

for milling and jobbing as a whole, and I should judge that this was what the Washington people were doing."

XXXVIII. An audit of plaintiff's San Diego mill was made by Eldred. He found that plaintiff had taken no excess profits at that mill during the period September 1, 1917, to June 30, 1918, and so reported to the chief of the enforcement division of the Food Administration, and also stated:

"With the audit made by Stewart & Co. before us, it was not a difficult task to prove it by the books as was anticipated, and we may say in general that the audit has been well and faithfully made. The discrepancies between the original 1,030 reports and the new statements are reconcilable, and when prima facie discrepancies on the 1,030 reports are, and were, adjusted there still remained no excess profit.

"There is no doubt as to 'service performed' constituting jobbing here; with the exception of the Government sales, the carload sales are negligible, both flour and feed.

"Therefore, and in view of the actual profit shown to you in this report, there was no object in our refusing to accept the Stewart audit as made and sent herewith for your records."

The Colton and Los Angeles audits were completed in the fall of 1919. The San Francisco audit was not completed until the latter part of February, 1920.

XXXIX. On October 2, 1919, Eldred demanded the additional sum of $29,327.49 from plaintiff on the ground of alleged excess profits received during the period of food control by the plaintiff's Colton and Los Angeles mills. Plaintiff on October 3 telegraphed Brandeis protesting against the additional demand made by Eldred. Plaintiff also invited Brandeis to come to California at its expense to settle the matter, and stated that Mr. Eldred "refuses to give consideration to our protest, likewise refuses to permit us to call in any reputable, nationally known accountant to determine whether his results are in accordance with Boyden's decision or regulations."

On October 4, 1919, Brandeis, replying to plaintiff's telegram, instructed plaintiff to immediately send a complete report indicating its views and differences in connection with the audit made by Eldred. He stated that in view of the

long delay already incurred he could not agree to the still further delay which would be incurred by putting outside auditors on plaintiff's books. He stated that after receipt of plaintiff's written report showing differences and its contentions, he would consider the matter in its entirety and would advise plaintiff further.

XL. On October 15, 1919, Eldred submitted to plaintiff an amended statemest of excess-profit account as found existing at its Los Angeles mill, increasing his demand of $29,-327.49 made on October 2, to a payment of $42,603.78, and stated:

"I may remind you that I hold your agreement to abide by the result of these audits which was made as a necessary condition for the issuance of the license under which you are now operating."

XLI. On October 21, 1919, plaintiff's check of July 28, 1919, for $38,901.31, was presented to the Merchants National Bank of Los Angeles for payment and was protested. Protest was wired by plaintiff to the enforcement division on October 21, 23, and 24, plaintiff contending that the check had been given to Eldred pursuant to an agreement that the check would not be cashed until investigation of plaintiff's mills had been completed.

On October 23 Brandeis informed plaintiff that Eldred's audit and findings of the plaintiff's Colton and Los Angeles units justified the collection of the check; that the plaintiff's refusal to honor the check would be construed to be an act of bad faith, and stated that a prompt refund would be made on account of any overpayment made by it on account of excess profits.

A few days later the check referred to was paid.

XLII. In the meantime plaintiff had engaged Haskins & Sells, certified public accountants, to review the report submitted by the auditors of the cereal enforcement division of the Food Administration and the report of Stewart & Co., covering examination of the books and records pertaining to the operation of plaintiff's Colton mill, during the period of Government control, for the purpose of accounting for the difference in profits as described in the two reports, and to examine the report submitted by the cereal enforcement

division covering the examination of the books and records pertaining to the operation of the Los Angeles mill during the period under Government control.

Haskins & Sells submitted their report covering the Colton mill on October 13, 1919, and on October 14 plaintiff transmitted that report to Brandeis. Haskins & Sells submitted their report covering the plaintiff's Los Angeles mill on November 3, 1919, and on the next day plaintiff transmitted it to the chief of the cereal enforcement division of the Food Administration. In commenting in their report of October 13 upon the different results shown by the Stewart and the Eldred audits, Haskins & Sells first called attention to the fact that the report of the Food administration auditor was based upon an attempt to separate the wheat operations between the jobbing and milling departments, while in the report of Stewart & Co. the wheat operations were taken as a whole without distinction as between milling and jobbing departments. They commented on numerous alleged inaccuracies disclosed in the Eldred audit which resulted in the showing of excess profits. In their report, with reference to plaintiff's Los Angeles mill, they again pointed out the number of alleged discrepancies in the Eldred audit. Their report indicated that instead of taking any excess profit, as reflected in the Eldred report, the earnings of plaintiff were $15,000 less than the amount allowable under the regulations.

XLIII. On January 13, 1920, a letter was addressed to plaintiff by Eldred, in which an extract from a telegraphic decision by Brandeis, rendered January 12, 1920, in connection with certain disputed points which had arisen during the course of the Eldred investigation, was inclosed. Plaintiff also received a telegram from Brandeis stating that Eldred had final authority to settle this case. Plaintiff was informed in the aforesaid letter from Eldred that a remittance in the sum of $42,603.78, the amount demanded by Eldred on October 15, 1919, in final liquidation of the excess profits taken by plaintiff's Los Angeles and Colton mills, would be expected not later than January 16, 1920.

On January 15, 1920, plaintiff mailed a check for $42,603.78 to Brandeis, in care of Eldred, at Los Angeles.

Plaintiff stated that the payment was made under protest on the ground that the Globe Grain & Milling Co. had not made any excess profits in its Colton or Los Angeles branches. It asked that a certificate be issued directed to the collector of internal revenue certifying to the payment of the remittance of $42,603.78 as well as to the payment of $38,901.31 on July 29, 1919.

On January 26, 1920, the United States Grain Corporation forwarded to plaintiff certificates covering its payment of excess profit for each individual mill.

XLIV. A few days prior to February 20, 1920, Eldred made an oral demand upon plaintiff for the sum of $86,-011.74, the amount of alleged excess profits taken at plaintiff's San Francisco mill.

On February 20 plaintiff wrote a letter to Brandeis, in care of Eldred, at Los Angeles, inclosing a check for $86,011.74, and stated that it was making the payment under protest for the reason that it had not yet had an opportunity to complete a check of the audit made by the enforcement division auditors, and for the further reason that the audit was not made in accordance with the rules of the Food Administration, as issued during the period of control.

On March 1, 1920, the United States Grain Corporation acknowledged receipt of plaintiff's check.

XLV. An audit of plaintiff's books at the various plants, with the exception of San Diego, where no claimed excess profits were found, was made by five auditors engaged by Eldred. For the most part the auditors engaged by Eldred were inexperienced. They ignored plaintiff's jobbing department and practically rewrote its books. The audit contained many errors to plaintiff's prejudice and was grossly inaccurate. Eldred's audit, upon which the payments in question were exacted, contained many errors to plaintiff's prejudice, and was so grossly inaccurate as to constitute bad faith.

XLVI. The payment of $38,901.31 made by plaintiff on July 28, 1919, the payment of $42,113.30 made on January 15, 1920, and the payment of $86,011.74 made on February 20, 1920, the three payments aggregating the sum of $167,-026.35, have been covered into the United States Treasury.

XLVII. In a preliminary audit letter mailed to plaintiff by the Commissioner of Internal Revenue January 25, 1927, it was indicated that in determining net income for 1917 and 1918 plaintiff would be entitled to a deduction of the amounts collected by the Food Administration on account of excess profits alleged to be due under Food Administration regulations. This suit was pending at the time of said letter and a final determination of plaintiff's tax liability for 1917 and 1918 has not been made.

The court decided that plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The issues in this case have already been stated. Plaintiff contends that its relations with the defendant were contractual; that the United States Food Administration compelled it to pay amounts which were covered into the Treasury of the United States which neither the Food Administration nor the United States had a right to exact because the plaintiff had not violated the United States Food Administration regulations and had not made unreasonable profits in its milling operations. Plaintiff further insists that it was not bound by the audit of its books made by a representative of the Food Administration, and, therefore, is not precluded from maintaining this suit. The defendant contends that plaintiff was bound by the audit of the Food Administration and can not recover the amounts demanded and exacted by the Food Administration as excess profits; that there was no contract by the plaintiff and the defendant whereby the United States can be compelled to refund the excess profits collected from plaintiff by the Food Administration.

The court is of the opinion that plaintiff is entitled to recover, first, because under the facts and circumstances disclosed by the findings it was not bound by the audit of the Food Administration, and, secondly, because the relation between plaintiff and the defendant was contractual.

At the outset it should be stated that the letter of July 17, 1919, written by the plaintiff to the Food Administra-

tion agreeing, in order that it might secure a license to continue business, to abide by the results of the audit of the Food Administration of the books and records of the company with the understanding that no claim for excess profits should be made until the matter was thoroughly discussed and understood between the parties, did not include an agreement by the plaintiff to be bound by an audit that contained errors and mistakes to the company's prejudice so gross and palpable as to show that a serious injustice had been done. Nor did the letter include an agreement on the part of the plaintiff, without first being given full opportunity by the Food Administration to be heard, to be bound by an arbitrary decision that it had not maintained a *bona fide* jobbing department and that it had violated Food Administration regulations and had charged excess profits in its said jobbing department. The audit of the books and records of the company was one thing; a decision that it had violated Food Administration regulations and had charged excess profits in its jobbing operations was another thing. We think the latter proposition was not included in the letter of plaintiff agreeing to abide by the results of the audit of its books. It is not unusual for a citizen to repose upon the good faith and discretion of some public officer representing the Government and responsible for the protection of its interest in a transaction, and the citizen frequently consents to stipulations submitting certain matters to the judgment of such officer. In such cases, however, such officer is required to exercise the highest degree of care, good faith, and honest judgment, and must not act arbitrarily or capriciously. The party who has stipulated to submit a matter to the judgment of another is entitled to have it exercised in good faith by the officer nominated and can not be bound unless such officer acts reasonably and with due regard to the rights of both contracting parties. Under letter of plaintiff to the Food Administration agreeing to abide by the results of its audit, the plaintiff was entitled to be heard before the Food Administration before any claim for excess profits should be made. The facts show that plaintiff was not afforded this opportunity under the agreement of July 17, 1919, by which

defendant seeks to bind plaintiff, but the audit of Eldred and his associates was held conclusive upon the plaintiff and it was compelled to pay the excess profits recommended by them. The facts further show that the audits of plaintiff's books and records, with the exception of the audit of its San Diego mill, which was the only audit made by Eldred, contained many errors to plaintiff's prejudice and were so grossly inaccurate as to constitute bad faith. These audits also completely ignored plaintiff's jobbing department and, therefore, constituted a decision by such auditors that plaintiff did not have a *bona fide* jobbing department and that it had charged excess profits in violation of the Food Administration regulations which permitted plaintiff to maintain and carry on a jobbing business.

The facts further show (Finding XXI) that with full knowledge of the facts, the method of accounting, and the manner in which the plaintiff carried on its jobbing business, the United States Food Administration approved its methods and practice and that the plaintiff was not required to make any change therein. At that time the plaintiff had been licensed by the Food Administration as a wholesaler and jobber. It appears that plaintiff maintained a *bona fide* jobbing department within the meaning of the Food Administration regulations and its license as a jobber, that its books were kept in such a manner as to clearly reflect the facts with reference to its transactions, and that it charged no excess profits in its operations.

In view of these facts, it is clear that in the audit, by which the defendant seeks to bind the plaintiff, the Food Administration, through the enforcement division, was guilty of an arbitrary and wanton disregard of plaintiff's rights and committed errors and mistakes to plaintiff's prejudice so gross and palpable as to leave no doubt in the mind of the court that grave injustice was done to plaintiff. In these circumstances the agreement is no bar to plaintiff's right to maintain this suit. *Ripley* v. *United States*, 223 U. S. 695; *Mundy et al.* v. *Louisville & N. R. R. Co.*, 67 Fed. 633. The facts in this case distinguish it from the case of *Cheyenne Milling Co.* v. *United States*, 59 C. Cls. 927, and other cases cited by the defendant in support of

its claim that plaintiff is bound by the Eldred audit. The audit stands on no higher basis than an award by arbitrators as to which it is well settled that the rule which governs is entirely different from that which the defendant claims should be applied in this case. It has been decided many times that a plain misconception of the facts, by reason of which it is made to appear that the arbitrators must have rendered a different decision had they proceeded in view of the true state of facts, about the existence of which there could be no reasonable question, may constitute a ground for avoiding the award. A mistake which is plain and palpable as an erroneous computation or calculation will be sufficient to avoid an award. When arbitrators are required to determine the rights of parties according to law, a plain mistake in their construction of the law is sufficient ground upon which to avoid the award. Although a mistake which is properly to be considered as an honest error of judgment will not avoid an award, a mistake of fact or law which is so gross and palpable as to seriously prejudice the rights of either party is sufficient ground for impeachment..

The relation of the plaintiff and the defendant was contractual. The monies collected, which plaintiff seeks to recover, were covered into the Treasury by the United States Food Administration, which amounts are wrongfully being withheld from the plaintiff—Findings XI and XII. The United States Food Administratiou exacted and collected from the plaintiff the amounts in question under the authority conferred by the act of August 10, 1917, 40 Stat. 276, and Executive order issued pursuant thereto, and the written agreements between the parties, and the licenses issued by the Food Administration. If the defendant is entitled to the sums collected, its right thereto arises by reason of such act, agreements, and licenses. In our opinion there is no merit in the claim of the defendant that plaintiff is not entitled to maintain this suit to recover the sums so collected. *U. S. Grain Corporation* v. *Phillips*, 261 U. S. 106. *United States* v. *Powers*, 274 Fed. 131.

Plaintiff is entitled to recover, and judgment in its favor against the defendant will be entered for $167,026.35. It is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear this case and took no part in the decision thereof.

HORACE OVERBEY, EXECUTOR OF THE ESTATE OF JOHN T. OVERBEY, DECEASED, AND ANNETTE J. OVERBEY v. THE UNITED STATES

[No. E-496. Decided November 3, 1930]

On the Proofs

Income tax; determination as to installment sale; secs. 212 (d) and 1208, revenue act of 1926.—Where there was a casual sale of personal property in the year 1919 at a price exceeding $1,000 payable in monthly installments evidenced by unsecured promissory notes, with transfer of title and without lien given for the unpaid portion, and during the said year over 25% of the purchase price was paid, there was no sale on the installment plan within the meaning of sections 212 (d) and 1208 of the revenue act of 1926, and the total profit realized was taxable for the year 1919.

Same; examination of return by Commissioner of Internal Revenue; reexamination by successor in office.—Even though the returns of a taxpayer have been examined by a predecessor in office the Commissioner of Internal Revenue, in the absence of a binding settlement, has the authority to reexamine and redetermine the taxpayer's liability.

The Reporter's statement of the case:

Messrs. Robert Ash and *Thomas J. Reilly* for the plaintiffs.

Messrs. Lisle A. Smith and *Frederick W. Dewart*, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Horace Overbey, is a citizen of the United States and a resident of Ryan, Oklahoma. He is the son of, and executor of the estate of, John T. Overbey, deceased. Annette J. Overbey, coplaintiff, is a citizen of the United States, a resident of Smithfield, Tarrant County, Texas, and is the wife of John T. Overbey, deceased.

II. In the year 1919 John T. Overbey, deceased, was the owner of 613 shares of the capital stock of the Wichita Valley Refining Company of Iowa Park, Texas, which had cost him $42,283.39. On July 5, 1919, he sold and transferred by assignment on the back of the certificates all of the stock directly to the following-named individuals for $122,600, as follows:

Certificates No. 33, 34, & 35, for 100 shares each, to N. H. Martin;

Certificate No. 36, for 90 shares, to R. S. Allen; and

Certificates No. 93 and 99, for 14 and 209 shares, respectively, to J. A. Kemp.

The stock so purchased by these parties was delievered to them, turned into the company, canceled, and new certificates of stock were issued to them.

The terms of sale provided that each of said individuals was to pay 15 per cent of the purchase price in cash on July 15, 1919, and the balance in 17 equal monthly installments, commencing on September 1st, 1919, each installment to be 5 per cent of the purchase price. These installments were evidenced by the promissory notes of the respective individuals, bearing 6 per cent interest. During the year 1919 the said John T. Overbey received, in cash and installments paid, 35 per cent of the total selling price. The notes were delivered by said John T. Overbey to J. F. Boyd, of Iowa Park, Texas, to whom other stockholders, who also sold their stock under the same conditions, delivered their notes, as a so-called trustee, to collect and distribute the money. No collateral was deposited by the purchasers to secure the notes.

III. On August 6, 1919, all of the physical assets of the Wichita Valley Refining Company were sold to the Texhoma Oil & Refining Company, and on the 6th day of

August, 1919, the board of directors of the Wichita Valley Refining Company executed a consent to the corporate dissolution of the said Wichita Valley Refining Company and filed a certificate of dissolution with the secretary of the State of Texas on August 15, 1919.

IV. The cash and installments actually received in the year 1919, amounting to 35 per cent of the total sales price, were reported and included in the income-tax return of the said John T. Overbey and Annette J. Overbey as income for that year upon the belief that the sale of such stock was a sale on the installment plan, in accordance with article 42, Regulations 45, of the Treasury Department.

V. On April 21, 1920, J. Frank Boyd, together with P. F. Gwynn and Representative Lucian W. Parrish, called upon the Honorable William M. Williams, Commissioner of Internal Revenue, and asked for a ruling regarding the method of reporting the transaction for income-tax purposes, and at that time furnished him a statement of the supposed facts of the transaction. Under date of April 28, 1920, the Commissioner of Internal Revenue wrote Hon. Lucian W. Parrish as follows:

"I am in receipt of your letter of April 21, 1920, with which you transmit a statement of facts concerning the sale of stock by certain stockholders in the Wichita Valley Refining Company, of Wichita Falls, on which you ask that a speedy ruling be given you. This is the case which you, in company with Mr. P. F. Gwynn and Mr. J. Frank Boyd, discussed on the occasion of your visit to this office on April 21, 1920.

"It appears that certain stockholders sold their stock to the amount listed in the statement upon the terms and conditions as hereinafter set out:

C. Birk, 120 shares	$24,000
J. F. Boyd, 444 shares	88,800
Mrs. J. F. Boyd, 150 shares	30,000
Mrs. M. D. Brown, 30 shares	6,000
C. Fields, 200 shares	40,000
B. N. Furguson, 114 shares	22,800
J. M. George, 279 shares	55,800
W. F. George, 96 shares	19,200
Ralph Hines, 73 shares	14,600
H. B. Hines, 210 shares	42,000
John T. Overbey, 613 shares	122,600
Joe Overbey, 125 shares	25,000
Horace Overbey, 125 shares	25,000
John Serrien, 300 shares	60,000

Reporter's Statement of the Case

"'The terms of the sale were 15 per cent cash, paid about July 15, and the balance in seventeen monthly installments, each amounting to 5 per cent of the total sale price, the first installment being due September, 1919, and the others extending through the year of 1920 and into the year 1921, but the sale is not finally consummated until the last installment is paid.

"'The stock of each individual who made the sale was placed in the hands of a trustee, namely, J. F. Boyd, of Iowa Park, Texas, and it was agreed that title to the physical assets of the company should remain vested in the corporation through this trustee for the benefit of the stockholders making this sale, until such time as final installments were paid, when the property should be transferred to the purchasers and the sale would be finally consummated. The stock of the corporation is the sole security, there being no other collateral of any nature.'

"In making out their income-tax returns the various stockholders who sold their stock reported income received during the year 1919 according to the ruling in article 42 of Regulations 45. You desire to know whether the stockholders were within their rights in reporting only the installments paid during the taxable year 1919.

"In reply you are advised that the ruling in article 42 is not limited to dealers in personal property on the installment plan, but may be followed by individuals who sell corporate stock or other personal property on the installment plan. The sale of stock of the Wichita Valley Refining Company is a sale on the installment plan, the method of the stockholders of protecting themselves in case of default being that outlined in (d): 'By conveyance to a trustee pending performance of the contract and subject to its provisions.' Therefore, the stockholders were within their rights in reporting only the income from the payments made during the taxable year 1919 in their 1919 income-tax returns."

VI. On or about May 13, 1921, the Bureau of Internal Revenue advised the said John T. Overbey that the sale was not a sale on the installment basis, and an additional tax of $6,191.57 was assessed against and paid by said John T. Overbey, and an additional tax was assessed against and paid by coplaintiff, Annette J. Overbey, to the collector of internal revenue at Dallas, Texas, in the amount of $15,-137.89. On April 14, 1924, John T. Overbey filed a claim for refund in the sum of $5,601.76, and on the same day co-

plaintiff Annette J. Overbey filed a claim for refund in the sum of $15,137.89 and another claim for refund in the sum of $589.81. These claims were rejected on February 24, 1925.

VII. William M. Williams resigned as Commissioner of Internal Revenue on April 11, 1921. Millard F. West was acting commissioner from that date until May 27, 1921, when David H. Blair became commissioner.

VIII. Under date of September 19, 1924, the Bureau of Internal Revenue wrote John T. Overbey and Mrs. Overbey, stating that the sale in question had been determined to have been an installment sale and advising that the tax collected as a result of the previous ruling would be refunded. The letter is as follows:

"The determination of your income-tax liability for the taxable year 1919, as set forth in office letters dated February 7, 1924, has been changed as a result of your letter of March 6, 1924, to disclose a total overassessment of $19,357.46.

"You are advised that the entire profit from the sale of the Wichita Valley Refining Company stock which was included by the examining officer in your income for 1919 has been eliminated, since this transaction is held to be on the installment basis, and the profit to be reported in your 1919, 1920, and 1921 returns is as follows:

	Cash received	Profit 65.5 plus %
1919	$42,910.00	$28,110.82
1920	73,560.00	48,189.96
1921	6,130.00	4,015.83
Total	122,600.00	80,316.61

"The adjustment on your 1920 and 1921 return will be made the subject of separate communication from this office.

"Your contentions that the additional deduction of $487.80 for interest paid should be allowed, and that your sons' income of $7,428.72 should be eliminated from your return, have been granted.

"Referring to the deduction of $600.00 on your 1919 return, representing an amount paid for four-year grass lease, which was prorated by the agent over the four years and reduced to $150.00, you are advised that regulation 45, article 109, provides as follows:

"'Where a leasehold is acquired for business purposes for a specified sum, the purchaser may take as a deduction in his return an aliquot part of such sum each year, based on the number of years the lease has to run.'

"The overassessment shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district. If the tax in question has not been paid, the amount will be abated by the collector. If the tax has been paid, the amount of overpayment will first be credited against unpaid income tax for another year or years and the balance, if any, will be refunded to you by check of the Treasury Department. It will thus be seen that the overassessment does not indicate that amount which will be credited or refunded, since a portion may be an assessment which has been entered but not paid."

IX. Under date of February 24, 1925, the Bureau of Internal Revenue again wrote John T. Overbey, stating that it had reversed the position taken in the letter of September 19, 1924, and had determined that the sale here involved was not a sale on the installment plan. The letter is as follows:

"A reexamination of your income-tax return for the year 1919 discloses a total overassessment of $3,097.60 instead of $19,357.46, as indicated in office letter dated September 19, 1924.

"With reference to the profit from the sale of the Wichita Valley Refining Company stock, you are advised that upon consideration of all the evidence submitted and particularly in the light of the facts and evidence set forth in the supplemental report of the revenue agent in charge at San Antonio, a recent decision of the Solicitor of Internal Revenue recommends that the conclusion reached by the former committee on appeals and review in regard to this sale is correct.

"This sale is therefore held to be a completed and closed transaction and the total profit realized, $80,316.61, is taxable for the year 1919. * * *

"The overassessments shown herein will be made the subject of certificates of overassessment which will reach you in due course through the office of the collector of internal revenue for your district. If the tax in question has not been paid, the amount will be abated by the collector. If the tax has been paid, the amount of overpayment will first be credited against unpaid income tax for another year or years, and the balance, if any, will be refunded to you by check of the Treasury Department. It will thus be seen that the overassessment does not indicate the amount which

will be credited or refunded, since a portion may be an assessment which has been entered but not paid."

X. It is stipulated between the parties that if the court shall decide that plaintiffs are entitled to recover any amount, the parties hereto shall thereafter compute the amount in accordance with the decision of the court.

The court decided that plaintiffs were not entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

A brief statement of the facts of the case shows that John T. Overbey and Annette J. Overbey, husband and wife, were residents of the State of Texas in 1919, and the property herein referred to was community property under the laws of that State. They owned 613 shares of stock in the Wichita Valley Refining Company, a Texas corporation, which stock had cost them $42,283.39. On July 5, 1919, the plaintiffs sold and transferred that stock to certain individuals for $122,600, payable 15% in cash and the balance in 17 equal monthly installments. The installments were evidenced by the promissory notes of the respective purchasers, bearing 6% interest. No collateral was given by the purchasers to secure the notes. During the year 1919 the plaintiffs received 35% of the total selling price. On August 6, 1919, all of the physical assets of the Wichita Valley Refining Company were sold and transferred to the Texhoma Oil & Refining Company, and on the same day the board of directors of the Wichita Valley Refining Company executed a consent to the corporate dissolution of that company, and on August 15, 1919, a certificate of dissolution of the company was filed with the secretary of state.

The plaintiffs filed their income-tax returns wherein they showed this transaction as an installment sale and returned as income for 1919 only the amount of cash received that year.

Commissioner of Internal Revenue Williams, on April 28, 1920, on the facts as they were stated to him by the interested parties, and his understanding of the law thereon, wrote to Congressman Parrish expressing the opinion that

Opinion of the Court

it was an installment sale and the stockholders were within their rights in reporting in their income-tax return for 1919 only the income from the payments made during 1919. Mr. Williams was the commissioner until and including April 9, 1921. Mr. Millard F. West was acting commissioner from that date until May 27, 1921, when Mr. Blair became commissioner. Under date of May 13, 1921, while Acting Commissioner West was in charge, the Bureau of Internal Revenue, upon consideration of further facts in the case and a reconsideration of the law, held that this was not an installment sale and all of the profit on the sale was income from 1919. An additional tax was assessed against the plaintiffs, which was duly paid. Subsequently, on February 24, 1925, while Commissioner Blair was in charge, the Bureau of Internal Revenue affirmed this decision. Claims for refund were duly filed and rejected.

The plaintiffs contend this is a sale under the installment plan as provided in Regulations 45 (art. 42) of the Treasury Department.

Prior to the act of 1926, sec. 212 (d), there was no expressed legislative authority for the installment sales method on which to compute incomes. *Blum's Inc.*, 7 B. T. A. 737. Until then the only methods provided by the statutes were the cash receipts or disbursement basis and the accrual basis. The Commissioner of Internal Revenue in 1918, with the approval of the Secretary of the Treasury, in order to meet a third class of cases, issued Regulations 45, art. 42, which permitted returns to be made under certain conditions on a partial payment or installment basis. Regulations 45, art. 42, reads as follows:

"*Sale of personal property on installment plan.*—Dealers in personal property ordinarily sell either for cash or on the personal credit of the buyer or on the installment plan. Occasionally a fourth type of sale is met with, in which the buyer makes an initial payment of such a substantial nature (for example, a payment of more than 25 per cent) that the sale, though involving deferred payments, is not one on the installment plan. In sales on personal credit, and in the substantial payment type just mentioned, obligations of purchasers are to be regarded as the equivalent of cash, but a different rule applies to sales on the installment plan. Deal-

ers in personal property who sell on the installment plan usually adopt one of four ways of protecting themselves in case of default: (*a*) Through an agreement that title is to remain in the seller until the buyer has completely performed his part of the transaction; (*b*) by a form of contract in which title is conveyed to the purchaser immediately, but subject to a lien for the unpaid portion of the purchase price; (*c*) by a present transfer of title to the purchaser, who at the same time executes a reconveyance in the form of a chattel mortgage to the seller; or (*d*) by conveyance to a trustee pending performance of the contract and subject to its provisions. * * *"

It is clear from the facts in the instant case that the plaintiffs do not bring themselves within the provisions of Regulations 45. Title did not remain in the seller until the final payment was made; no lien for the unpaid portion of the purchase price was given; and there was no conveyance to a trustee pending the performance of the contract. If the plaintiffs are to recover, they must come under sec. 212 (d) of the revenue act of 1926, which is made to retroactively apply, in computing income, to the act of 1918. Sec. 212 (d) and sec. 1208 of the revenue act of 1926 read as follows:

"SEC. 212 (d). Under regulations prescribed by the commissioner with the approval of the secretary, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the total profit realized or to be realized when the payment is completed, bears to the total contract price. In the case (1) of a casual sale or other casual disposition of personal property for a price exceeding $1,000, or (2) of a sale or other disposition of real property, if in either case the initial payments do not exceed one-fourth of the purchase price, the income may, under regulations prescribed by the commissioner with the approval of the secretary, be returned on the basis and in the manner above prescribed in this subdivision. As used in this subdivision the term 'initial payments' means the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable period in which the sale or other disposition is made."

"INSTALLMENT SALES

"SEC. 1208. The provisions of subdivision (d) of section 212 shall be retroactively applied in computing income under

the provisions of the revenue act of 1916, the revenue act of 1917, the revenue act of 1918, the revenue act of 1921, or the revenue act of 1924, or any of such acts as amended. Any tax that has been paid under such acts prior to the enactment of this act, if in excess of the tax imposed by such acts as retroactively modified by this section, shall, subject to the statutory period of limitations properly applicable thereto, be credited or refunded to the taxpayer as provided in section 284."

The plaintiffs do not bring themselves under the provisions of section 212 (d), as it is admitted the purchase price was more than a thousand dollars, and more than 25% (i. e. 35%) of the consideration was paid in the taxable period.

If, however, they are not strictly within the provisions of the statute, the plaintiffs contend the letter from Commissioner Williams, defining the transaction as a sale on the installment basis, is binding on his successors in office and can not be disturbed. The facts show Commissioner Williams had no claim before him when he wrote his letter to Congressman Parrish with the statement of what were supposed to be the correct and true facts. His letter was advisory and based on a supposititious case. Income-tax returns of the plaintiffs had been filed but not audited. As a matter of fact, the facts presented to Commissioner Williams did not correspond to the real facts of the transaction, as afterwards disclosed upon investigation by Commissioner Blair. Certain essential facts were erroneously stated to Commissioner Williams. The stock sold was never held by a trustee as security for the payment of the notes; the title to the physical assets of the company did not remain vested in the corporation through the trustee for the benefit of the stockholders making the sale, until the last installment was paid; all of the assets of the Wichita Valley Refining Company were conveyed to the Texhoma Oil & Refining Company and the former corporation surrendered its charter before the first installment fell due. However, it makes no material difference whether Commissioner Blair believed his predecessor's ruling to be erroneous in law or fact; the commissioner had the authority to examine the returns and determine the tax. Even though the returns had been examined,

in the absence of a binding settlement, the commissioner had the authority to reexamine and redetermine the tax liability of the plaintiffs. *Sweets Company of America, Inc.*, v. *Commissioner of Internal Revenue*, 40 Fed. (2d) 436 and cases cited. *McIlhenny* v. *Commissioner of Internal Revenue*, 39 Fed. (2d) 356, *Yokohama Ki-Ito Kwaisha, Ltd.*, 5 B. T. A. 1248, *James Couzens*, 11 B. T. A. 1040, *Younker Bros. Inc.*, 8 B. T. A. 333.

The petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

ABRAHAM ROSENFIELD AND SAMUEL RAPKIN, TRADING AS ROSENFIELD & RAPKIN, v. THE UNITED STATES

[No. D-841. Decided November 3, 1930]

On the Proofs

Dent Act; implied contract; expenses of preparing bid.—See *Martin* v. *United States*, 61 C. Cls. 430.

Same; authority of officer to contract.—See *St. Louis Tin & Sheet Metal Working Co.* v. *United States*, 62 C. Cls. 277.

Same; procedure.—See *American Rolling Mill Co.* v. *United States*, 61 C. Cls. 882.

The Reporter's statement of the case:

Mr. Raymond M. Hudson for the plaintiffs.

Mr. William W. Scott, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant. *Mr. Assistant Attorney General Herman J. Galloway* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiffs are now and were at all times hereinafter mentioned engaged in business as partners at Boston, Massachusetts, in the manufacture of clothing and uniforms.

Reporter's Statement of the Case

II. During 1916 and 1917 plaintiffs were engaged in the performance of Government contracts theretofore entered into for clothing for the United States Army. August 3, 1918, and before plaintiffs' contracts were completed, they were notified along with other Government contractors by the depot quartermaster at Boston that the office of the Quartermaster General at New York City would receive bids for woolen clothing until 2 p. m., August 9, 1918, and that the Government reserved the right to accept a percentage on all proposals. This notification also informed plaintiffs that all contracts would be written and would be for a period of three months, based upon their actual present production, and that increased capacity due to the installation of new machinery would not be permitted. The contracts which plaintiffs already had with the Government, and under which they were operating, were not entered into as a result of the bids.

III. August 5, 1918, plaintiffs submitted a written proposal for 30,000 pairs of woolen trousers at an aggregate price of $22,500. This proposal was in excess of plaintiffs' actual present production. Within thirty days thereafter, and before any action had been taken by the defendant on its proposal, plaintiffs made arrangements to enlarge their plant and to increase its capacity by the installation of new and additional machinery, in anticipation of a contract for 30,000 pairs of trousers for which they had submitted a proposal, and other Government contracts. The aforementioned notification of August 3, 1918, was as follows:

"Subject: Bids for contracts on Army clothing.

"1. The following advertisement will appear in the Boston newspapers very shortly: 'Office Quartermaster General, New York City. Sealed proposals for furnishing overcoats, cotton coats, cotton breeches, wool coats, wool breeches, and wool trousers will be received until 2.00 p. m., August 9, 1918. Information on application. Envelopes containing proposals to be endorsed "Proposals for Clothing" and addressed to the Manufacturing Branch, Clothing & Equipage Division, 109 East 16th Street, New York City.'

"2. It is the desire of the Boston depot that every contractor shall be given the privilege to bid for this Army work. In making the bids it will be well for you to consider the following facts: That four weeks will be given

between the issuing of material and the first deliveries; all contracts to be written for a period of three months, based upon their actual present production, increased capacity due to installing new machinery will not be permitted. The Government reserves the right to reject a percentage or all of these proposals. The responsibility for the inspection of the garments will be placed absolutely upon the contractor. This means that the contractor must secure a sufficient inspection force and in any case where supervision is performed by the Government it will be voluntarily and will in no way lessen the responsibility of the contractor. It is absolutely necessary that the rejections be eliminated to the utmost, and if the contractor has more than three per cent rejections the Government reserves the right to cancel the entire contract.

"3. This depot is in a position to show samples of various garments and to furnish specifications for same when desired.

"4. This action has been authorized by the Quartermaster General and an entirely new procedure is being followed in awarding contracts. This procedure will require more than the usual length of time and consequently the bids we are securing will apply to contracts covering the period, December, January, and February, except for a limited number of garments which are yet to be placed in September, October, and November.

"5. Any further information concerning the above may be obtained from the Boston depot, manufacturing branch.

"By authority of the Depot Quartermaster."

IV. Shortly after plaintiffs had submitted their bid to the Quartermaster General a member of the firm made several inquiries of Lieutenant Lawrence S. Mann, of the Quartermaster Corps, stationed at the Quartermaster Depot, Boston, Massachusetts, with reference to the matter of the contract, and Mann expressed his opinion that plaintiffs would be awarded a contract and suggested that plaintiffs be prepared to begin work immediately upon execution of the new contract. Mann was not authorized to make a contract with plaintiffs and he had at no time told them that a contract had been awarded to them by anyone having authority to do so. Shortly after the conversation with Mann, plaintiffs commenced to procure additional equipment and machinery as above set forth. The total of the expenditures for such additional machinery and equipment exceeded the profit

that they would have earned had the contract for which they had submitted a proposal been made. At that time plaintiffs were delinquent in their deliveries on prior contracts and Lieutenant Mann was urging them to make every effort to become current with their deliveries.

V. November 1, 1918, there appeared in the Daily News Record, a newspaper published in New York, a news item stating that contracts had been awarded to clothing manufacturers in many cities for 3,865,000 pairs of Army trousers ordered by the Quartermaster of the U. S. Army and giving the names of contractors who had been awarded Government contracts for the manufacture of the said trousers, which list of names included that of plaintiffs for 30,000 pairs. There is no proof that this article was published by authority of or with the consent of anyone authorized to act for the United States in the matter of contracts.

VI. November 2, 1918, Lieutenant Mann, of the Quartermaster Corps, at Boston, sent plaintiffs the following letter:

"From: Depot Quartermaster, U. S. Army, Boston, Mass.
To: Rosenfield and Rapkin, 15 School St., Boston, Mass.
Subject: Trousers contract:

"1. This depot has just received advice from the office of the Quartermaster General, New York City, that you have been recommended for an award on woolen trousers, delivery to commence January 4th.

"2. According to records of this branch, it is to be noted that you are greatly delinquent on your present contract and unless you make every effort to overcome this delinquency it will be impossible for you to make your first delivery by that date. This depot realizes that you have been delayed in delivery against your present contract on account of sickness, etc., yet it will be absolutely necessary that you start first deliveries against your new contract on January 4th. Material will be issued to you not later than December 1st.

"3. In the the next issuance of awards contractors who have been delivering exactly in accordance with the terms of their contract will only be considered.

"4. It is requested that you advise this branch immediately just when you will complete your present contract.

"By authority of the Depot Quartermaster.

"(Signed) LAWRENCE S. MANN,
"*1st Lt. Quartermaster Corps,*
"*Asst. to D. Q. M.*"

VII. Subsequently plaintiffs were informed by some one in the quartermaster's office at Boston that the number of their contract when made would be 7924–B.

VIII. No formal contract was ever entered into by and between the Government and the plaintiffs, and there is no proof that a contract was ever prepared by anyone acting for or on behalf of the Government.

IX. After the armistice of November 11, 1918, plaintiffs were called on the telephone and later an officer of the defendant came and stopped them from working on a prior contract. At that time plaintiffs had not begun manufacturing any of the 30,000 pairs of woolen trousers under the bid of August 3, 1918.

X. Within less than thirty days after plaintiffs submitted their written proposal of August 5, 1918, as set forth in Finding III, and without waiting for the acceptance of said proposal and the execution of a contract, they began preparations for the making of 30,000 pairs of trousers, and on or before the last of September, 1918, they surrendered and vacated their factory which they had been using and were using on a prior contract with the Government for which they were paying a rental of $75 a month. In order that they might have more space in which to operate their plant they entered into a new lease for another room at a rental of $200 a month, and commenced the installation of machines in said room, and began to purchase materials in anticipation of the contract for which they had made bid. When they were notified that deliveries under their former contracts would be suspended, and that no formal contract for the 30,000 pairs of trousers would be entered into, they attempted to sublease the room that they had leased and which they expected to use in the performance of said proposed contract as well as the contracts they already had. They were unable to sublease the same for a period of eight months, and during that period they were compelled to pay, and did pay, $200 a month rent for the same, making a total of $1,600.

XI. This new plant with the increased facilities was used by plaintiffs from the latter part of August to sometime after the armistice on November 11, 1918, for performing

work under another contract not involved herein, for all of which they have been paid by the defendant.

XII. Plaintiffs bought sufficient thread to be used in the performance of the contract for which they had made a bid at a cost of $1,400. Subsequently, plaintiff sold the thread, and the difference between the cost thereof and the sales price was $982.47.

They expended $561 for the installation of electric power and lights in the additional room which they rented. They expended $834 for new machinery. This machinery was later sold for $700. They also expended $301.50 for 30,000 labels for use on the trousers for the manufacture of which they had made a bid. They also expended $2,717 for some special sewing machines and buttonhole machines in anticipation of additional contracts with the Government. These machines were later sold for $700. Plaintiffs purchased $3,000 worth of tape for use in connection with the proposed contract. They later sold this tape for $1,074.

XIII. Plaintiffs filed a claim under the Dent Act with the Secretary of War for $12,016.53. The evidence does not show when this claim was filed, but it was filed sometime prior to June 30, 1919. The claim was considered and, after a hearing by the Board of Contract Adjustment, was disallowed by that board. No appeal was taken to the Secretary of War.

The court decided that plaintiffs were not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiffs ask judgment for $12,016.53, with interest, as just compensation for the alleged cancellation of a contract which they claim they had with the defendant for the manufacture of 30,000 pairs of woolen trousers for the United States Army. The amount claimed is based upon expenditures for machinery and equipment claimed to have been made in preparation for the performance of the alleged contract.

Plaintiffs are not entitled to recover because, first, there was no contract, informal or otherwise; secondly, assuming that there was an informal contract there was no appeal to

Opinion of the Court

the Secretary of War as required by the Dent Act. The facts show that the Government called for bids to be submitted to the Quartermaster General at New York for the manufacture of trousers, reserving the right to accept a percentage of all bids. It was also provided in the call for bids that they must be on the basis of actual present production and that increased capacity, due to installation of new machines, would not be permitted.

Plaintiff submitted a proposal in excess of its actual present production. Plaintiff was already engaged in the performance of a contract with the Government upon which it was delinquent in its deliveries. After plaintiffs had submitted their bid to the Quartermaster General a member of the firm made several inquiries of Lieutenant Mann, of the Quartermaster Corps, stationed at the quartermaster depot at Boston, with reference to the matter of the contract, and Mann expressed his opinion that plaintiffs would be awarded a contract. Mann was not authorized to make a contract with plaintiffs, and he had at no time told them that a contract had been awarded to them by anyone having authority to do so. Shortly after the conversation with Mann plaintiffs commenced to procure additional equipment and machinery in anticipation of a contract for which it had made a bid and in anticipation of possible further contracts with the Government. The total of such expenditures exceeded the profit that would have been earned had the contracts for which the plaintiffs had submitted a proposal been made.

November 2, 1918, Lieutenant Mann notified plaintiffs of advice from the Quartermaster General at New York that they had been *recommended* for an award on woolen trousers. The recommendation of the Quartermaster General was not an award of a contract to plaintiffs. So far as appears, nothing further was ever done about the matter of the contract. Upon these facts it is clear that plaintiffs never had a contract with the Government.

If it be assumed that the recommendation of the office of the Quartermaster General at New York and the conversations by a member of the partnership of Rosenfield & Rapkin with Lieutenant Mann could be regarded as an in-

formal contract, plaintiffs can not recover inasmuch as no appeal was taken to the Secretary of War and there is no proof that this official ever decided the matter. *United States Bedding Co.* v. *United States*, 55 C. Cls. 459. *Baum, Trustee*, v. *United States*, 64 C. Cls. 323.

The petition must be dismissed and it is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear this case and took no part in the decision thereof.

ROCKY BROOK MILLS COMPANY v. THE UNITED STATES

[No. D-387. Decided November 3, 1930]

On the Proofs

Contracts; formal execution; validation by noncontracting officers.—Where a contemplated contract has not yet been signed by the authorized contracting officer of the Government, its recognition as a duly executed contract by other officers, having no contractual authority, does not make it one.

Same; necessity of writing and signatures.—In the absence of an acceptance by the Government of something of value for which it can be held liable as upon a quantum meruit, there must be, in order to constitute a contract, a writing or writings signed by the parties thereto.

Same; typewritten signature.—Where it is contended that typewritten words are in fact a signature to a contract, it must be shown that they were so intended.

The Reporter's statement of the case:

Mr. John Philip Hill for the plaintiff. *Howe, Hill & Bradley* were on the briefs.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant. *Mr. Charles F. Kincheloe* was on the brief.

Reporter's Statement of the Case

The court made special findings of fact, as follows:

I. The Rocky Brook Mills Company, plaintiff herein, was, on April 30, 1918, duly organized as, and has since been and is now, a corporation under the laws of the State of Rhode Island.

II. On some date prior to April 20, 1918, one Richard L. Broome, president of the Wakefield Mills, located at South Kensington, R. I., and other mills, obtained an option to purchase a building and real estate, located about two miles from South Kensington. On April 20, 1918, Mr. Broome had a conference in Washington with Colonel H. J. Hirsch and Captain Schofield of the Quartermaster Corps of the Army, and on the same day there was written a letter from Colonel Hirsch to Rocky Brook Woolen Mills, a copy of which follows:

WAR DEPARTMENT,
OFFICE OF THE QUARTERMASTER GENERAL OF THE ARMY,
Washington, April 20, 1918.

Contract No. 2085-B.
No. 427.7-145-SE.
From: Purchasing & Contracting Officer, S. & E. Div.
To: Rocky Brook Woolen Mills, Adams, R. I.
Subject: Award of contract.

1. In accordance with your offer, contract is awarded you for furnishing and delivering to this corps, f. o. b. cars So. Kingston, R. I.:

Approximately: 50,000 O. D. blankets, 4-lb. as per specif. #1312, dated March 20, 1918, @ $8.00 each. (Mills-Rocky Brook Woolen Mills, So. Kingston, R. I.)

Delivery: 2,000 blankets during July and 8,000 monthly thereafter until completion of total quantity.

2. Contract will be numbered "2085-B," dated April 20, 1918, and payments thereunder will be made by the Boston depot quartermaster at Cambridge, Mass., who will have entire charge of the contract.

3. Bond in the amount of $40,000 will be required for the faithful fulfillment of this contract, and you are requested to advise this office the name of a qualified surety company who will join in this bond with you.

4. It is hereby agreed and understood that any goods which may be rejected on this contract may be purchased by the Government at a reduction in price to be agreed upon

and determined by the Government and the contractor, and if so purchased that these goods shall then apply as deliveries against this contract; and it is further understood that the Government shall be offered these rejected goods before the goods can be disposed of elsewhere.

5. Please acknowledge receipt.

Colonel H. J. HIRSCH,
Q. M. Corps,
Purchasing & Contracting Officer.
By H. M. SCHOFIELD,
Captain, W. M. R. C.

WS–140
Zkr/CT

The letter was signed for Colonel Hirsch by Captain Schofield, where his name appears.

When a copy of this letter was delivered to Mr. Broome on the afternoon of April 20, 1918, and when the original thereof was mailed out on April 22, and remailed on April 27, the words "This is your authority to proceed without delay," did not appear thereon in ink or otherwise.

III. After returning to Rhode Island from Washington, Mr. Broome caused the plaintiff corporation to be organized, took up his option on the mill site, and let a contract to the C. I. Bigney Construction Company, for remodeling the old building on the mill site and for the building of new buildings thereon. The contract price for such remodeling and construction was estimated at $46,500, subject to certain adjustments. The actual charge of the Bigney Company for the work was $36,722.54, no part of which has been paid. The plaintiff corporation also let other contracts for the purchase of mill machinery of various kinds, a part of which was later delivered to it, and subsequently repossessed by the vendors upon the failure of the plaintiff to make payment thereof. It does not appear how much, if anything, the plaintiff paid for such machinery. Construction work on the mill began about May 2, 1918, and continued to about September 1, 1918.

IV. On April 29, 1918, a letter dated April 24, 1918, and three copies of agreement No. 2085–B, dated April 20, 1918, were mailed to Rocky Brook Woolen Mills, with a letter enclosing a form of performance bond in the sum of $40,000.00, in duplicate, the letter stating, in part:

"Please have these papers properly executed * * *. All the papers should be forwarded to this office at the

earliest practicable date for approval and completion of signatures * * *."

V. The performance bond was never executed or returned to the Government. Receipt of the letter dated April 24, 1918, was not acknowledged by anyone.

VI. When contract No. 2085–B was mailed on April 29, 1918, to Rocky Brook Woolen Mills it was unsigned by the Government. The words appearing at the end of the agreement in typewriting,

"H. J. HIRSCH,
"*Colonel, Quartermaster Corps, U. S. A.*
"By ____________________
"*Captain, Q. M. R. C.*"

are not shown to have been intended to be a signature. It was the custom in the War Department to prepare agreements in this form for signature; it was not the custom for agreements of any kind to be signed by typewriter.

VII. On May 28, 1918, Captain Abbott Stevens, representing the Ordnance Department, visited the plaintiff's mill and inspected the same for the purpose of determining whether plaintiff would be able to complete its contract (2085–B) for the manufacture of blankets on the scheduled time. Captain Stevens interviewed Mr. Broome, president of the corporation, and the contractors, who were repairing and equipping the plaintiff's plant preparatory to starting the manufacture of blankets. They assured Captain Stevens that they would have the mill completed and equipped with machinery to start on the contract in time to be able to deliver the 2,000 blankets in July.

Captain Stevens following his visit of inspection made the following report to his superior officer:

"There is no machinery or shafting of any description in this mill; the roof is partly completed; the foundation for the weave room has just been started; the dye house has not yet been started; the floors have not been laid; only a few window frames are in place."

The work of altering and remodeling the buildings in which plaintiff's plant was to be located was not completed until the latter part of August, 1918. The required machinery and equipment for the manufacture of blankets were

never fully installed and the plaintiff did not at any time manufacture blankets at this plant and was never in a position to do so.

VIII. At the time Captain Stevens inspected plaintiff's mill and reported the result of his inspection to his superior officer, his family was operating two or three mills manufacturing O. D. Army blankets for the Government. One of the mills owned and operated by Captain Stevens's family was located at Peacedale, R. I., a distance of about a quarter of a mile from plaintiff's mill.

IX. Under date of June 14, 1918, the Acting Quartermaster General telegraphed to Rocky Brook Woolen Mills, as follows (referring to the contract in question): "Have you received same; if so execute papers immediately." Prior to the morning of June 24, 1918, this telegram, although addressed to Rocky Brook Woolen Mills, had been received by the plaintiff. On June 24, 1918, the plaintiff wrote to Colonel Hirsch as follows:

ROCKY BROOK MILLS CO.

MANUFACTURERS OF

WOOLEN AND WORSTED FABRICS

Tel. 4374 Gramercy, P. O. Address: Wakefield, R. I.
New York Office: 257 4th Avenue, Room 1904.

SOUTH KINGSTON, RHODE ISLAND, *June 24, 1918.*

Major Gen. WOOD, *Acting Quartermaster,*
Irving Place and 16th St., New York City.

DEAR SIR: Your telegram received and we regret that we have not been able to sign the contract and return to you before this time, but the property purchased, we discovered, was somewhat mixed up on account of a trustee dying without filing the trustee's papers before death, which necessitated a new trustee being appointed for the estate. This property has got to come to us clear before we can secure our performer's bond. If it is agreeable to you to have us sign the contract and return to you without having the performer's bond which we would send to you later, we will do so at once.

Please advise.

Yours very truly,

ROCKY BROOK MILLS CO.
R. L. BROOME, *Pres.*

RB/J.

Reporter's Statement of the Case

X. On June 22, 1918, by letter dated June 20, 1918, Colonel Hirsch gave notice of the cancellation of the contract, as follows:

WAR DEPARTMENT,
OFFICE OF THE QUARTERMASTER GENERAL OF THE ARMY,
New York City, June 20, 1918.

In answer refer to File No. 427.7–145–CE–C.
From: Contracting Officer, C. & E. Division.
To: Rocky Brook Woolen Mills, South Kingston, R. I.
Subject: Cancellation—Award of Contract No. 2085–B.

1. Referring to your award of contract No. 2085–B, dated April 20, 1918, for furnishing and delivering to this corps, f. o. b. cars South Kingston, R. I., approximately 50,000 blankets, you are informed that since the inspecting officer who visited this plant reported as follows:

"There is no machinery or shafting of any description in this mill; the roof is partly completed; the foundation for the weave room has just been started; the dye house has not yet been started; the floors have not been laid; only a few window frames are in place."

and since, therefore, it is practically impossible for you to make delivery as called for in the contract, in accordance with your request, the said award of contract is hereby cancelled.

2. Please acknowledge receipt, consenting to the cancellation.

H. J. HIRSCH,
Colonel, Q. M. Corps.
By S. W. SHAFFER,
Captain, Q. M. R. C.

Zkr/EN

XI. Although addressed to Rocky Brook Woolen Mills, this letter reached the plaintiff on or before June 25, 1918, on which date the plaintiff replied thereto as follows:

ROCKY BROOK MILLS CO.
MANUFACTURERS OF
WOOLEN AND WORSTED FABRICS

Tel. 4374 Gramercy. P. O. Address: Wakefield, R. I.
New York Office: 257 4th Avenue, Room 1904

SOUTH KINGSTON, RHODE ISLAND, *June 25, 1918.*

Captain S. W. SHAFFER, War Department,
Clothing and Equipage Department,
109 East 16th St., New York City.

DEAR SIR: Yours of June 20th just came to hand this morning and we wish to advise you that the main building

is now complete with the exception of sprinkler pipe and steam pipe, which are being installed to-day. The roof of the addition is half completed and the material to finish the job is on the ground. Our machinery is all ordered and part of our motors for power have arrived. As we have let out the contracts for remodeling and machinery, we are in a very bad position, under the conditions, as the balance of our machinery we expect, will have arrived by July 15th.

This plant will be a modern plant in every respect and capable of big production which we should be pleased to have produce nothing but Government blankets if that is your pleasure. We can and will deliver our blankets as per our contract, deliveries even if it is necessary to have them made for us elsewhere.

Trusting this makes our position clear to you, we remain,

Yours very truly,

ROCKY BROOK MILLS CO.
R. L. BROOME, *Pres.*

XII. Under date of June 12, 1918, the plaintiff and the Quartermaster Corps of the Army, for and in behalf of the United States, represented by Captain Desmond, entered into an agreement covering the purchase by the plaintiff from the Government of certain wool, which contract recited, inter alia:

"That the wool shall be used in the fulfillment of Government contract No. 2085–B, dated April 20, 1918, with Rocky Brook Mills Company, but in the event the above Government contract is cancelled the Government shall have the right to specify how the wool is to be used."

During this period purchasers of machinery, of the kind needed by plaintiff, were required to have letters of priority in order to buy the same. Some time in the month of May letters of priority were issued by the Government officials to plaintiff authorizing plaintiff to purchase the necessary machinery for the completion of contract No. 2085–B.

XIII. On August 3, 1918, the board of directors of the plaintiff adopted the following resolution:

"*Resolved*, That the president or treasurer of this corporation be, and hereby are, authorized and directed to enter into, execute, and deliver in the name and under the seal

Reporter's Statement of the Case

of the corporation, a contract with the United States Government in substantially the form annexed hereto; also to enter into, execute, and deliver in the same manner any correction, modification, or supplement thereof or thereto; also to enter into, execute, and deliver in the same manner any bond required by the United States Government in connection with the above; and also to do or cause to be done for or in behalf of the corporation all acts necessary to carry out and perform the above."

No previous action by the board of directors of the plaintiff corporation had been taken, nor is it shown that Richard L. Broome was previously authorized, by formal corporate action, to execute the contract in question. The contract in question had been canceled by the Government, and the plaintiff advised of such cancellation, long prior to August 3, 1918.

XIV. At some time between August 3, 1918, and August 12, 1918, the plaintiff mailed to the Government contract No. 2085–B, executed by said plaintiff.

When so mailed the contract had been altered by the erasure therefrom of the words Rocky Brook Woolen Mills and the substitution of the words Rocky Brook Mills Company. The Government did not at any time consent to such alteration.

No performance bond was submitted with the executed agreement.

XV. On August 12, 1918, the Quartermaster Corps returned the three executed copies of the agreement to the plaintiff, with the following letter:

ACTING QUARTERMASTER GENERAL,
August 12, 1918.

ROCKY BROOK MILLS CO.,
South Kingston, R. I.

Contract # 2805–B.

1. With reference to the above-mentioned contract, you are requested to refer to the communication from this office under date of June 20th, in which you were advised the same was cancelled.

2. The three numbers of contract signed by the officers of your company, together with the evidence submitted by you,

are therefore returned to you for such disposition as you care to make of same.

By authority of the Acting Quartermaster General:

CONTRACTING BRANCH,
By S. W. SHAFFER,
Captain, Q. M. R. C.

ORB: CIG
3 Encl.
(3 numbers of contract.)

XVI. Based on the cost at which it was manufacturing blankets at its Wakefield mill, and other mills, the plaintiff would have made a net profit of $60,000 on the 50,000 blankets covered in contract No. 2085–B, had this contract not been canceled and the said blankets had been manufactured and delivered at the contract price.

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

This is a suit brought by the Rocky Brook Mills Company to recover upon what is alleged to be a "contract in writing" with the United States entered into April 20, 1918, under which the plaintiff undertook to furnish and deliver to the United States Army 50,000 blankets, and which contract, it is alleged, was breached by the United States on June 20, 1918, with consequent loss to the plaintiff.

It is not contended that the plaintiff delivered or tendered any blankets to the Government, or is entitled to recover as upon quantum meruit. The damages claimed are alleged to have accrued to the plaintiff by reason of the cancellation of the contract by the Government prior to the specified time for delivery of the blankets. The damages claimed consist of anticipated profits which the plaintiff insists it would have made had the contract not been canceled, and of loss due to the purchase of a mill site and the installation of machinery therein necessary to enable the plaintiff to manufacture the blankets in question.

The basic question in the case is whether or not there was in existence at the time of the alleged "cancellation," a contract between the parties upon the breach of which damages

Opinion of the Court

can be assigned. If there was no contract, obviously there could be no breach. Under the statutes of the United States, a claim for damages as based upon the refusal of the Government to accept performance by the plaintiff, must be grounded upon a contract in writing, signed by both the parties thereto. Section 3744, U. S. R. S.; *St. Louis Hay & Grain Co.* v. *United States*, 191 U. S. 159; *Clark* v. *United States*, 95 U. S. 539; *South Boston Iron Co.* v. *United States*, 118 U. S. 37.

While it has been held that such a contract need not in all cases be embodied in one instrument, signed by both parties at the end thereof (*Swift & Co.* v. *United States*, 270 U. S. 124), it has been uniformly held that in the absence of an acceptance by the Government of something of value under the contract for which it can be held liable quantum meruit, there must be a writing, or writings, signed by the parties, to sustain a claim of the character of the claim involved in this suit. *Johnston* v. *United States*, 41 C. Cls. 76; *Gillespie* v. *United States*, 47 C. Cls. 310.

It is indispensable that there must be shown, at some point, to have been a written acceptance of a written offer, and that the acceptance must be within the terms of the original offer, that it must be by the offeree, to whom the offer was made, and must be communicated to the offeror prior to the withdrawal of the offer. *American Smelting & Refining Co.* v. *United States*, 259 U. S. 75.

In our opinion the plaintiff in this suit has wholly failed to establish such a contract. It is clear that the instrument designated by the plaintiff as a "contract in writing," a copy of which is appended to the petition filed herein and which is designated in the petition as the "contract in writing" upon which the plaintiff relies for recovery, is not such a contract for the reason that it was never signed by any person acting, or claiming to act, for the United States.

This writing was prepared in the office of Colonel H. J. Hirsch, of the Quartermaster Corps, in Washington, D. C., and mailed on April 24, 1918, to Rocky Brook Woolen Mills, with a letter of transmittal requesting that it be executed by said Rocky Brook Woolen Mills and returned to the Gov-

ernment for approval and signature. When mailed on April 24, 1918, the contract was not signed or executed by anyone. It did not purport to be a contract between the Government and the plaintiff, but between the Government and Rocky Brook Woolen Mills. The plaintiff corporation was not a party thereto, its name nowhere appears in, or on, the instrument, and, as a matter of fact, the plaintiff corporation was not in existence, it being subsequently, on April 30, 1918, granted a certificate of incorporation by the State of Rhode Island.

All of the facts in regard to the subsequent handling of the agreement are not perfectly clear, but it is satisfactorily shown and we have found that (1) the agreement was never executed by the Rocky Brook Woolen Mills, (2) that at least up to June 24, 1918, a date which is important in view of another contention of the claimant, it had not been signed by the plaintiff, (3) that it was not formally acted upon by the board of directors of the plaintiff corporation until August 3, 1918; (4) that when the agreement was returned to the Government the word "Woolen" had been erased from the name "Rocky Brook Woolen Mills" and the word "Company" written in, to make the contract read "Rocky Brook Mills Company," all without the consent or authority of the Government, and (5) that the agreement was never signed by any person for the United States and was returned to the plaintiff on August 12, 1918, unexecuted, with a letter calling the attention of the plaintiff to the fact that the agreement had been canceled, and the plaintiff so advised, on June 20, 1918. Under these facts the instrument can not be said to be a "contract in writing" within the meaning of the statute, and there can be no recovery thereon. Section 3744 U. S. R. S.

It is argued that the typewritten words—

"H. J. HIRSCH,
"*Colonel, Quartermaster Corps, U. S. A.*
"By --------------------
"*Captain, Q. M. R. C.*"

in fact constituted a "signature," and that a signature may be affixed by typewriter as well as by use of pen and ink. Without being understood as holding that in a proper case

a signature might not be affixed by use of a typewriter, as well as by other method, we think it is clear that the typewritten name "H. J. Hirsch" was not so affixed in this case. The blank line left for the signature of the officer actually to sign the document shows that the execution was incomplete. The typewritten name "H. J. Hirsch" and the other words following it were nothing more than a formal conclusion of the contract, making the document ready for signature, and not constituting a signing of the contract. A typewritten name will not be held to be a signature unless there is some showing made that it was in fact intended to be a signature. *Tabas* v. *Emergency Fleet Corporation*, 9 Fed. (2d) 648. No such showing has been made in this case and the plaintiff's contention upon this point can not be sustained.

But it is argued that, even if the contract of April 20, 1918, above discussed, was not executed by the Government, a "contract in writing" existed by virtue of a so-called "letter of award" or "award of contract," also dated April 20, 1918, and signed by H. M. Schofield, a captain in the Quartermaster Corps, for Colonel H. J. Hirsch, the purchasing and contracting officer of the Quartermaster Corps, and by the subsequent acceptance thereof by the plaintiff. The so-called award was a letter dated at Washington on April 20, 1918, from Colonel Hirsch, addressed to "Rocky Brook Woolen Mills," entitled "Award of contract" and set out verbatim in the second finding of fact. A copy of this letter was delivered to Richard L. Broome, on the day of its date, by Captain Schofield, and the original mailed to Rocky Brook Woolen Mills, and an acknowledgment of its receipt requested. On April 29, 1918, Rocky Brook Mills Company, by Broome, its president, acknowledged receipt of the letter and said, among other things, "We are taking care of the matter of the performance bond and will get it in shape at the earliest possible moment." On the same day (April 29, 1918) the contracts branch of the Quartermaster Corps sent to Rocky Brook Woolen Mills, in triplicate, the contract above mentioned, with a letter entitled "Contract papers 2085-B for execution" and enclosing a form of performance

bond in the amount of $40,000, in duplicate. The letter said in part: "Please have these papers properly executed * * *. All the papers should be forwarded to this office at the earliest practicable date for approval and completion of signatures. * * *" Receipt of this letter was not acknowledged, the performance bond referred to was never furnished, and nothing further appears to have been done in regard to the execution of the contract until some time subsequent to June 24, 1918.

On June 14, 1918, the Acting Quartermaster General wired to Rocky Brook Woolen Mills, referring to the contract in question, "Have you received same if so execute papers immediately * * *" to which wire the plaintiff replied by letter of June 24, 1918, "Your telegram received and we regret that we have not been able to sign the contract and return to you before this time * * *", and saying further that the plaintiff was unable to furnish bond on account of some defect in the title to its property. The plaintiff did not execute or return the agreement until some time after June 24, 1918.

In the meantime, the depot quartermaster of the Boston, Massachusetts, territory, had caused an inspection of the plant and property of the plaintiff to be made. On May 28, 1918, the mill site was visited and inspected by Captain Abbott Stevens, who reported to his superior officer as follows: "There is no machinery or shafting of any description in this mill; the roof is partly completed; the foundation for the weave room has just been started; the dyehouse has not yet been started; the floors have not been laid; only a few window frames are in place." On May 29, 1918, the depot quartermaster forwarded this report to the supply and equipment division of the Quartermaster Corps at Washington, adding that the inspecting officer requested "that the facts be further investigated, as it was not believed that a satisfactory product would be obtained from the mill for at least three months after the time of delivery stated in the contract." The report went through the woolens branch of the clothing and equipment division at New York, which branch recommended that "in view of the circumstances * * * detailed, it is recommended that this contract be

cancelled." This recommendation was made on June 15, 1918. By letter dated June 20, 1918, mailed June 22, 1918, the Quartermaster Corps, by Colonel Hirsch, contracting officer, gave formal notice to Rocky Brook Woolen Mills that (referring to the contract in question) "the said award of contract is hereby cancelled." The plaintiff acknowledged receipt of this letter on June 25, 1918, but did not consent to the cancellation, saying that it could and would deliver the blankets "as per our contract deliveries even if it is necessary to have them made for us elsewhere."

The question presented is whether or not there was such a written offer and an acceptance thereof as constituted a contract in writing within the meaning of the statute. It is unnecessary to pass upon the question as to whether the letter of award, dated April 20, 1918, was such an offer as could be turned into a binding contract by acceptance by the plaintiff. It might well be argued that the letter was merely a preliminary step, evidencing the willingness of the Government to deal with the plaintiff, if and in the event a satisfactory contract was subsequently entered into. The fact that the letter itself referred to a contract which was to be prepared later, and did not purport to contain all of the terms of the agreement, creates a strong presumption that the letter itself was not intended to be the contract. *South Boston Iron Co.* v. *United States*, *supra*.

But taking the view urged by and most favorable to the plaintiff that the letter of award constituted a binding offer, needing only acceptance by the plaintiff to constitute a binding contract in writing, and passing entirely the question as to how an offer made and addressed to Rocky Brook Woolen Mills, at a time when the plaintiff was not in existence, could be "accepted" by the plaintiff without the consent of the party making the offer, the plaintiff has still failed to show a valid acceptance of the offer prior to its cancellation. The plaintiff had not accepted the offer, and was still unable to furnish the bond required, on June 24, 1918. It was too late to accept the offer on June 25, 1918, after the receipt of the notice of cancellation from the Government.

It is insisted that the inspector's report of the condition of the plaintiff's mill of May 28, 1918, did not truly reflect

the physical condition of the property, and that the plaintiff would have been able to perform the contract had it not been canceled by the Government. It is argued that the inspector was not wholly disinterested and that his family operated other and competitive mills in the vicinity of the plaintiff's mill; that the cancellation was not justified and was premature. The contention is wholly without merit. A subsequent inspection of the property on August 31, 1918, more than a month after the first deliveries of blankets would have been due, showed that the mill was not yet ready for operation. There is nothing in the record to show that the Army officer acted otherwise than fairly and honestly in the performance of a routine inspection to which all mills with which the Government had or expected to have dealings were regularly subjected, and the court will not indulge in any presumption that his very remote and slight interest in some other mill affected his report.

So long as the offer remained wholly executory, it was the right of the Government to withdraw it with or without cause. *Duke* v. *United States*, 57 C. Cls. 535.

The cancellation was amply justified in this case. The plaintiff, having admitted as late as June 24, 1918, that it had not yet acquired title to its property and was unable to furnish a performance bond, was hardly in position to expect the Government to rely upon it for war materials scheduled for delivery a few weeks later.

It is insisted that the Government recognized the "Award" as a contract and treated it as such, and is now estopped to deny the existence of the agreement or to question its validity. This contention grows out of the sale by the wool top and yarn branch of the Quartermaster Corps of the Army, on June 12, 1918, of a quantity of wool-top yarn, under an agreement executed by the plaintiff corporation and accepted for and on behalf of the United States by Captain Desmond of the Quartermaster Corps. This agreement contains a recital: "That the wool shall be used in the fulfillment of Government contract No. 2085-B, dated April 20, 1918, with Rocky Brook Mills Co., but in the event the above Government contract is cancelled the Government shall have the right to specify how the wool is

to be used." It is argued that this is a contract in writing, and that it by implication recognized and ratified the award of the contract of the same number, and made unnecessary the execution of the contract itself. We do not believe that the agreement can be so construed. The wool purchase and sale contract does not purport to have anything whatever to do with the former contract, or to waive the necessity of the execution thereof. Nor does it purport to incorporate the terms of the other contract by reference or otherwise. It has to do with one subject only, namely, the sale of certain wool by the Government to the plaintiff. The officers executing it can not be presumed to have undertaken to go out of the line of the performance of the duties assigned to them and to have contracted for something not referred to in the contract or to have intended, by ratification or otherwise, to have entered into a contract for the purchase, by the Government, of blankets.

Their power to bind the Government was clearly limited to acts within the scope of their authority as officers; they could not have validated the original contract by executing it directly, and their indirect recognition of the agreement can not be held to have any greater force than a direct attempt to execute the agreement would have had.

It is also to be noted that there is no language in the wool-purchase contract even purporting to validate the former contract but that on the contrary, the possibility that the original contract might be canceled by the Government was specifically mentioned.

The plaintiff well says that the Government should not execute a contract with its citizen, lead it to rely upon the contract and, without just cause, cancel the contract, thereby causing loss to the contractor. But in this case the losses claimed to have been sustained by the plaintiff are not due to reliance by it upon an executed contract with the Government, but to its assumption that it would be able to obtain and ultimately to perform such a contract with profit to itself. So long as no contract was in fact entered into the plaintiff could not have been required to take any steps toward fulfillment of the contract, and if it did so in this case, must be held to have assumed the risk that the con-

tract would be obtained. The loss is not due to the fact that the Government canceled a contract, but to the fact that, in apt time, it withdrew is offer to enter into one.

There is yet an additional reason why the plaintiff can not recover. It is pointed out on behalf of the Government that there is no competent evidence in the record establishing any proper measure of the plaintiff's damages. With this contention we are in full accord. It is not shown that the plaintiff ever made a definite election to treat the cancellation as a breach of the contract. It appears that it attempted to treat the cancellation as inoperative and to keep the contract alive. In such a case the limit of the recovery of the plaintiff is the difference between the contract price and the open market price of the article sold. *Southern Cotton-Oil Co.* v. *Heflin*, 99 Fed. 339; *Roehm* v. *Horst*, 178 U. S. 1.

There is no showing that the contract price exceeded the market price of the blankets at the times specified for delivery. Such proof was necessary to establish any competent measure of damages. Furthermore, there is nothing in the record upon which even an estimate of the amount of the loss of the plaintiff directly chargeable to the alleged cancellation complained of could be made. The expenditures of the plaintiff for a mill site, for the remodeling of the plant, and for the purchase of equipment and machinery were in the nature of capital investments. They were not incurred in the manufacture of the blankets mentioned in the contract, but in the building and equipment of a mill in which the plaintiff hoped blankets could be manufactured. They do not constitute an allowable measure of damages for breach of a contract such as the contract involved in this case.

The plaintiff's claim for anticipated profits can not be sustained by proof of the manufacturing costs of another mill, operating under different conditions, and in nowise comparable to the plaintiff's mill which was not constructed, had no organized labor force, and was without an ascertained and tested management. A judgment against the United States is not to be based upon a computation arrived at by conjecture or speculation. *Maryland Casualty Co.* v.

Reporter's Statement of the Case

United States, 53 C. Cls. 81; *Standard Steel Car Co.* v. *United States*, 67 C. Cls. 445.

Under the facts shown the plaintiff is not entitled to recover and its petition will be dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear this case and took no part in its decision.

ROYAL BANK OF CANADA v. THE UNITED STATES

[No. F-334. Decided November 3, 1930]

On the Proofs

Income tax; overpayment not assessed; use as credit; refund; necessity of assessment in allowance of refund or credit claim; interest.—(1) Where an overpayment by a taxpayer is not covered by an assessment but is nevertheless used by the Commissioner of Internal Revenue in satisfaction of taxes due for other years, it can not be recovered on the ground that the commissioner in form rejected the taxpayer's claims for refund and for credit of the overpayment.

(2) It is not necessary that there be a formal assessment of an overpayment to enable the Commissioner of Internal Revenue to allow a claim for refund or for credit of the overpayment.

(3) Where the actual transaction shows that the Commissioner of Internal Revenue allowed a claim for credit or for refund, and is inconsistent with its formal rejection, the claim will be held to have been allowed, with interest due accordingly.

The Reporter's statement of the case:

Messrs. Ewing Everett and *J. Robert Sherrod* for the plaintiff. *Mr. William E. Sims*, and *Miller & Chevalier* and *Zabriskie, Sage, Gray & Todd* were on the briefs.

Mr. Charles R. Pollard, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant. *Messrs. Assistant Attorney General Herman J. Galloway* and *Ralph E. Smith* were on the brief.

The court made special findings of fact, as follows:

I. Plaintiff is a Canadian corporation and was, and is, duly authorized and does a banking business in the State of New York with principal office and place of business at New York.

II. March 15, 1919, plaintiff filed with the collector of internal revenue for the second district of New York a tentative return and a request for an extension of time, upon which it estimated its income and profits tax for the fiscal year ended November 30, 1918, at $448,000. No assessment was ever made of the estimated tax shown on this return. On the day that this tentative return was filed plaintiff paid to the collector $112,000, being one-fourth of the estimated tax. The commissioner on February 13, 1919, in a memorandum to the collectors of internal revenue and others concerned, authorized the use of a tentative return and an extension of time of forty-five days for the filing of a completed return. February 24, 1919, after the passage of the revenue act of 1918, the commissioner by public notice granted a general extension of time to all taxpayers, upon the filing of a tentative return of forty-five days in which to file a completed return for 1918. On the same date the commissioner sent plaintiff a telegram giving it an extension of time, and on June 13, 1919, he granted a further extension of time for filing a completed return for 1918 to July 1, 1919, in a telegram as follows:

"Replying to your communication June twelve extension to July one granted for completion nineteen eighteen return the Royal Bank of Canada. Second installment tax required to be paid June fifteenth. Any deficiency in installments plus interest thereon from respective due dates at rate one-half one per cent per month required to be paid at time filing return and an amount which combined with previous payments exclusive of interest equals three-fourths tax disclosed by completed return required to be paid on or before September fifteenth. Copy this telegram should accompany payment June fifteenth."

III. June 16, 1919, plaintiff filed the completed income and profits tax return, Form 1120, for the fiscal year ended November 30, 1918, showing the amount of $21,001.62 as the

total tax due for that year. The tax shown on this return was assessed. Inasmuch as plaintiff had made a payment to the collector on the estimated tax for this year shown on the tentative return of an amount in excess of the total tax shown due on the completed return, no further payment was made thereon.

IV. December 22, 1920, plaintiff filed with the collector a claim for refund of $84,617.10 of the tax paid for the fiscal year ended November 30, 1918. The basis of this claim was stated therein as follows:

"On March 15, 1919, The Royal Bank of Canada, pursuant to regulation, filed a tentative income and excess profits tax return on Form 1031 T and paid one-quarter of the estimated tax, $112,000. Thereafter a final return was filed wherein the total income and excess profits tax for the fiscal year ending November 30, 1918, was shown to be $21,764.27. This return has now been audited by a Government inspector who has assessed an additional tax of $5,618.63 upon the bank for said period, making the correct amount of tax therefor $27,382.90."

V. January 4, 1924, the commissioner notified plaintiff that he had determined its tax liability for the fiscal year ended November 30, 1917, to be $47,540.74, of which $6,043.50 had been assessed, leaving an additional tax of $41,497.24, which was assessed on the February, 1924, special list.

VI. March 18, 1924, the commissioner by letter of that date notified plaintiff that he had determined its tax liability for the fiscal year ended November 30, 1918, to be $41,737.55, of which amount $21,001.62 had been assessed on the original return, leaving the amount of $20,735.93 to be assessed. An additional assessment of this amount was made May 12, 1924, leaving an overpayment of $70,262.45 for the fiscal year 1918.

At the same time the commissioner notified plaintiff that its claim for refund of $84,617.10 was rejected. The reason for the statement in the letter of the commissioner that the claim for refund of $84,617.10 was rejected was not because there had not been an overpayment for 1918 but because there had been no assessment of the amount which had been overpaid.

April 4, 1924, the plaintiff filed with the collector a claim asking that $41,497.24 of the overpayment for the fiscal year 1918 be credited against the additional assessment in that amount for the fiscal year 1917 and that $28,765.21 of the overpayment for the fiscal year 1918 be refunded with interest. Before this claim was filed plaintiff's counsel had taken up the matter of the overpayment for 1918 with the commissioner's office at Washington and, in the claim filed with the collector, plaintiff stated: "It is our information from the department in Washington that this claim can be adjusted as above stated through the collector's office, where there should be a record of the payment of the $112,000.00." At the time this claim was filed plaintiff's counsel went to the collector's office and had a talk with him about the matter and the collector made a memorandum on this claim with reference to the 1917 additional assessment on the February, 1924, list and also indorsed on the claim, as follows: "Do not forward to Washington. See me. Tax to be adjusted in New York. Excessive."

VII. May 8, 1924, plaintiff filed an amended claim for credit with the collector requesting that the overpayment of $70,262.45 for the year 1918 be credited against the additional assessment for the fiscal year ended November 30, 1917, in the amount of $41,497.24 and against the unpaid assessment of tax for the fiscal year ended November 30, 1923, in the amount of $28,765.21. Plaintiff also asked in this claim that it be paid interest on the overpayment of $70,262.45 for 1918 from June 23, 1921, a date six months after the filing of the claim for refund, to the date of the allowance of the credit.

On May 23, 1924, the collector of internal revenue for the second collection district of New York transferred the overpayment of $70,262.45 for 1918, made on March 15, 1919, and applied $41,497.24 thereof against and in satisfaction of the additional assessment of tax in that amount for the fiscal year ended November 30, 1917, and applied the balance of $28,765.21 against and in satisfaction of the outstanding tax assessed and due for the fiscal year ended November 30, 1923, as requested by the plaintiff in the claim for credit.

The collector thereupon transmitted the claim to the Commissioner of Internal Revenue at Washington. Thereafter, on September 29, 1924, the commissioner wrote the collector at New York requesting that he advise him with reference to the plaintiff's tax for 1918. October 3, 1924, the collector advised the commissioner that an investigation of the records in his office showed that plaintiff had paid a tax of $112,000 for the fiscal year 1918; that the amount determined and assessed by the commissioner as the tax for that year in the amount of $41,737.55 had been satisfied out of the aforesaid payment; and that the remainder of the payment for the fiscal year 1918 had been transferred and applied in satisfaction of the additional assessment of $41,497.24 for 1917 and the outstanding assessment of tax due for the fiscal year 1923 in the amount of $28,765.21. On November 1, 1924, the commissioner wrote plaintiff as follows:

"Reference is made to your claim for credit of $70,262.45, income and profits taxes for the fiscal year ended November 30, 1918.

"You are advised that the records of this office as well as those of the collector of internal revenue for your district, show only an original assessment on account No. 40669 of $21,001.62 and an additional assessment May, 1924, list, page 46, line 3, of $20,735.93, aggregating $41,737.55, which is the correct tax liability for the fiscal year 1918.

"Therefore, your claim will be rejected.

"For your information a copy of a letter dated October 3, 1924, from the collector of internal revenue is inclosed, wherein he advises that a payment of $112,000.00 was made and shows that the excess of this payment over the amount of tax assessed for the fiscal year 1918 has been applied against assessments for the fiscal years 1917 and 1923."

The letter of October 3 mentioned in the commissioner's letter was the letter of the collector above referred to with reference to the credit. The Commissioner of Internal Revenue took no action other than above mentioned with reference to the matter of refund or credit of the overpayment for the year 1918. Neither did the commissioner allow or pay any interest upon the overpayment for 1918.

Opinion of the Court

On February 9, 1926, the commissioner wrote plaintiff as follows:

"Reference is made to your inquiry relative to interest upon an amount of $70,262.46 overpaid for the fiscal year November 30, 1918, and transferred by the collector of internal revenue to taxes outstanding for other years.

"In reply, you are advised that section 1324 (a) of the revenue act of 1921 and section 1019 of the revenue act of 1924 apply only to refunds and credits when approved by the commissioner. Inasmuch as this office has no record that this transaction was affirmed by documentary approval of the commissioner, interest is not payable thereon."

The court decided that plaintiff was entitled to recover, in part.

LITTLETON, *Judge*, delivered the opinion of the court:

Upon motion of defendant a new trial was granted in this case and the original findings of fact and opinion published June 3, 1929, were vacated and set aside.

Plaintiff contends that it is entitled to recover the entire overpayment of $70,262.45 for the fiscal year 1918 plus interest because the commissioner rejected its claim for refund and claim for credit, although the amount of the overpayment was used to satisfy and discharge its liability for the additional assessment of $41,497.24 for the fiscal year 1917 and $28,765.21 of its tax assessed and due for the fiscal year 1923. It argues in support of its contention that the collector may yet make demand for and require it to pay the tax for 1917 and 1923.

The position of the defendant seems to be that where there has been an overpayment of tax which has never been formally assessed the Commissioner of Internal Revenue cannot allow a claim for refund or credit thereof, and that since the overpayment here in question was not assessed by the commissioner and that since he did not formally allow a claim, no interest is payable upon the overpayment for 1918.

The contention of plaintiff that it is entitled to refund of the entire overpayment on the ground that it may yet be called upon to pay the tax for 1917 and 1923 is without merit, but its claim that it is entitled to interest on the overpayment is correct. Even if collection of the tax for 1917 and 1923, which was satisfied by the application of the overpayment for 1918, was not barred by the statute of limitation there is no justification upon the facts for assuming that the collector of internal revenue will ever undertake to collect the tax for those years a second time. His records show no liability and the plaintiff has written evidence under the signature of the collector and the commissioner that those taxes had been satisfied.

There is no merit in the contention of the defendant that the commissioner can not allow a claim for refund or a claim for credit unless there has been a formal assessment of the overpayment. It has been admitted from the beginning that plaintiff overpaid its tax for 1918. The statute requires that when there has been an overpayment of tax, the amount thereof shall be refunded or credited and the fact that overpayment came about under circumstances out of the ordinary routine procedure of the bureau with respect to the allowance of refunds and credits would not prevent the commissioner from allowing a claim in respect thereof.

We are of opinion from the facts in this case that the plaintiff's claim was allowed within the meaning of the statute. The only justification for the position that the claim was not allowed is the sentence "Therefore, your claim will be rejected," appearing in the third paragraph of the letter of November 1, 1924, of the commissioner to the plaintiff set forth in Finding VII; but we think it is of no significance in view of the other facts showing that the commissioner upon receipt of the claim from the collector wrote the collector for information with reference to the tax for 1918, and the reply of the collector setting forth in detail the amount of assessments for 1918, the amounts of pay-

ments, and the indorsement on his books applying the overpayment for 1918 against the additional tax for 1917 and the tax for 1923, and the last paragraph of the aforementioned letter of the commissioner of November 1, 1924, which informs plaintiff of what had been done with respect to the payment of the $112,000 for 1918. The statement that the claim would be rejected is inconsistent with what was done and was doubtless inserted by the writer of the letter because there had been no assessment of the amount of the overpayment and because the steps usually taken by the bureau in determining that there had been an overassessment and the preparation and the signing of a schedule thereof, etc., had not been taken.

Upon the facts we are of opinion that the credit of the overpayment for 1918 against the additional assessment for 1917 and the tax due for 1923 was allowed within the meaning of section 1019 of the revenue act of 1924 on November 1, 1924; that plaintiff is entitled to recover interest upon that portion of the overpayment in the amount of $41,497.24 credited against an additional assessment in that amount for 1917 from the date of the overpayment on March 15, 1919, to the date of the additional assessment, and that it is entitled to recover interest upon $28,765.21 of the overpayment credited against the original tax for 1923 from March 15, 1919, to the due date of such tax.

Inasmuch as the facts do not show the exact date on which the additional tax for 1917 was assessed nor the exact date on which the tax for 1923 satisfied by credit was due, judgment will be withheld and the parties will file a stipulation showing these dates and the amount of interest to which the plaintiff is entitled computed from March 15, 1919, to the dates mentioned. It is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear this case and took no part in the decision thereof.

MOHAWK CONDENSED MILK COMPANY v. THE UNITED STATES

COLORADO CONDENSED MILK COMPANY v. SAME

[Nos. H-234 and J-126. Decided November 3, 1930]

On the Proofs

Food control; excess profits on milk; Federal Trade Commission cost accounting; nature of evidence; contents of certified documents.—Under a food control agreement during war emergency the manufacturers of condensed and evaporated milk agreed to refund excess profits made on sales to the military establishments, profits to be calculated on basis of the cost accounting system of the Federal Trade Commission. In counterclaim to recover alleged excess profits the defendant relied upon certifications by the accounting officer of documents, the correctness of whose contents was in controversy. *Held*, that such contents must be proved the same as other facts. Certification of documents proves only the document itself and permits its introduction in evidence without further proof of identification, but such certification does not establish as a fact the correctness of the statements or figures therein contained.

The Reporter's statement of the case:

Mr. Robert N. Anderson for the several plaintiffs. *Humphreys & Gwinn* were on the briefs.

Mr. P. M. Cox, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant. *Mr. Charles F. Kincheloe* was on the brief.

The court made special findings of fact, as follows:

I. The Mohawk Condensed Milk Company, hereinafter referred to as the Mohawk Company, is a New York corporation and the Colorado Condensed Milk Company, hereinafter referred to as the Colorado Company, is a Colorado corporation. During the calendar year 1918 substantially all of the outstanding capital stock of the Colorado Company was owned by the Mohawk Company.

II. The Colorado Company filed its income and profits tax return for 1917. It was finally determined that plain-

tiff had overpaid its tax for 1917 in the amount of $12,163.17 and this amount was refunded to plaintiff by Treasury check on January 27, 1923. Thereafter, February 16, 1927, the Commissioner of Internal Revenue authorized the disbursing clerk of the Treasury Department to pay this company interest of $427.71 on said overpayment.

III. The Mohawk Company duly filed an income and profits tax return for 1918. Upon final determination the Commissioner of Internal Revenue held that this plaintiff had overpaid its tax for this year in the amount of $6,946.76 and that it was entitled to interest thereon of $2,469.52, totaling $9,416.28. The commissioner duly authorized and instructed the disbursing clerk of the Treasury Department to pay these amounts.

There is no question in these cases as to the correctness of the overpayments and the amounts of interest above set forth.

Before payment was made by the Treasury Department the Comptroller General of the United States withheld payment upon the ground that these companies were indebted to the United States in certain amounts for overpayments made by the Government on canned milk under certain contracts.

IV. On May 12, 1926, the Comptroller General advised the Mohawk Company, as follows:

"Your claim for refund of income tax erroneously or illegally collected for the year 1918, as shown by Sched. IT–R–17349, Cert. of Overassessment No. 449400:

Refund	$6,946.76
Interest	2,469.52
Total	9,416.28

has been settled and the sum of $9,416.28 has been allowed per above certificate number, payable from the appropriation 27422, 'Refunding taxes illegally collected, 1927, and prior years.' Two warrants to issue—

"One to the Treasurer of the United States for $8,491.54.

* * * * *

"This action is taken in order to make a refund of indebtedness to the United States in the sum of $8,491.54, as shown by Cert. No. U. S. 304–W.

"One to Mohawk Condensed Milk Co. for $924.71."

In the certificate of the Comptroller General, U. S. 304–W above referred to, addressed to plaintiff under date of June 2, 1924, the Comptroller General stated as follows:

"The claim of the United States for overpayments made on canned milk under cost-plus agreement (Nov. 1, 1917, to Dec. 31, 1918), as follows:

72,188 cases evap. milk sold Army		$386,477.98	
Costs	$354,198.98		
Profit allowed, @ 42¢ per case	30,318.96		
		384,517.94	
Amount due the United States			$1,960.04
3,000 cases condensed milk sold Army		$23,940.00	
Costs	$18,681.00		
Profit allowed, @ 59¢ per case	1,770.00		
		20,451.00	
Amount due the United States			3,489.00
2,500 cases evap. milk sold Marine Corps		16,125.00	
Costs	$12,032.50		
Profit allowed, @ 42¢ per case	1,050.00		
		13,082.50	
Amount due the United States			3,042.50
Total amount due the United States			8,491.54

has (have) been settled and the sum of eight thousand four hundred and ninety-one dollars and fifty-four cents has been found due the United States per above certificate number. The amount due should be remitted to this office promptly by check, draft, or money order payable to the United States."

The Mohawk Company refused to agree to what the Comptroller General had done.

V. July 23, 1927, the Comptroller General of the United States advised the Colorado Company as follows:

"The claim of the United States for overpayments made on canned milk under cost-plus agreement (Nov. 1, 1917, to Dec. 31, 1918), as follows:

31,732 cases evaporated milk sold Army		$166,307.41
Costs	$150,155.82	
Profit allowed, @ 42¢ per case	13,327.44	
		163,483.26
Amount due the United States		2,824.15

Less:

Set-off for interest on taxes erroneously collected as shown by Internal Revenue Schedule No. IT–I–22027, approved February 16, 1927, by certified number $155953, dated June 6, 1927	$427.71
Net amount due the United States	2,396.44

has (have) been settled and the sum of two thousand three hundred ninety-six dollars and forty-four cents has been found due the United States, per above certificate number. The amount due should be remitted to this office August 23, 1927, by check, draft, or money order payable to the 'United States'."

The Colorado Company refused to agree to what the Comptroller General had done. These statements of the comptroller did not include all of the milk furnished to the military services hereinbefore mentioned.

VI. September 7, 1917, the United States Food Administrator invited the manufacturers of milk to hold a conference with a view of making suggestions as to fixing prices during the war and a conference was held in Washington, September 26, 1917, of manufacturers of evaporated and condensed milk. At this conference plaintiffs were present or represented. On a roll-call vote taken, the manufacturers were unanimously in favor of voluntary regulation. It was moved that 30 cents per case on evaporated milk and 40 cents per case on condensed milk would be a fair and reasonable profit to recommend to the Food Administration, and by a standing vote the industries represented at the meeting unanimously recommended these figures.

A circular, No. 272, United States Food Administration, public information division, stated in part, as follows:

"Manufacturers of canned milk representing ninety-five per cent of the entire industry in the United States in conference with the United States Food Administration to-day agreed voluntarily and unanimously to submit their business to the supervision of the Food Administration during the period of the war, and to take no war profits but to make the profit on their goods sold to the public the same as on goods to the Army and Navy.

"Since the first of May they have been furnishing supplies to the Army and Navy at a price and on a basis of profit determined by the Federal Trade Commission. This they obligated themselves in their conferences to-day to continue

throughout the war, and further they agreed to supply the commission for relief in Belgium and the American Red Cross at the same prices as that made to the Government.

"The canned-milk men expressed their willingness to cooperate with the Food Administration by limiting the price to the public so as not to return to the industry a greater profit than was received before the war. During that period, they declared a profit of 30¢ a case on evaporated milk, and 40¢ a case on condensed milk was considered fair. In meeting the greatly increased demand on account of needs created by the war, the manufacturers said they had found difficulties in the increased price of fresh milk and the high cost of tin plate. These have forced the increased prices for their product during the last 18 months. The only way in which they as manufacturers can limit the cost of their commodity to the public, they declared, is through the limitation of profits, since they can not control the cost of the raw materials upon which they depend."

December 2, 1918, the milk manufacturers' war committee wrote the food purchase board of the United States Food Administration in part as follows:

"* * * In view of the fact that the entire agreement between the milk manufacturers' war committee and the Army, Navy, and Marine Corps has not heretofore been reduced to writing in a single document, the committee sets forth the following as its understanding of the agreement, as it has existed in the past, and as it shall continue for the above-designated period, with the exception of two slight modifications which will be noted hereafter.

"1. It is the understanding of the committee that the Army, Navy, and Marine Corps shall purchase their requirements as nearly as may be from month to month, proper allowance being made for such reserves as it may be necessary to carry regularly against future needs.

* * * * *

"8. The milk manufacturers agree that profit made on sales to the Army, Navy, and Marine Corps as an average for the period in question shall not be more than 42¢ per case on evaporated milk and 59¢ per case on condensed milk, calculated on the basis of Federal Trade Commission cost accounting as set forth in the pamphlet issued by the Federal Trade Commission under date of July, 1917, entitled 'Uniform contracts for cost accounting, definitions, and methods.'

"The 42¢ per c/s profit on evaporated milk and 59¢ per case profit on condensed milk represents the same margin

of profit as a net profit of 30¢ per case on evaporated milk and 40¢ per case on condensed milk, the higher figures being reached by agreement with the Army, Navy, and Marine Corps to meet the Federal Trade Commission basis of accounting, which does not take into account certain items of cost which are regularly borne by the industry.

"At the close of the period during which supplies may be purchased on this basis, following January 1st, 1919, investigation of the costs by the respective companies shall be made by the Federal Trade Commission or some other agency agreed upon by the buyers and manufacturers. In the event that any manufacturer has made, during the period, an average of more than 42¢ per case on evaporated milk and 59¢ per case on condensed milk the excess above such margin of profit shall be refunded by the respective manufacturers to the Army, Navy, or Marine Corps, respectively. In the event a manufacturer has made less than 42¢ per case profit on evaporated and 59¢ per case on condensed milk, neither the Army, Navy, nor Marine Corps shall be obligated to make any additional payments."

On the facts set forth in this finding is based the agreement under which the plaintiffs furnished the United States military services mentioned with condensed and evaporated milk.

Under this agreement the sales to the Army, Navy, and Marine Corps were to be considered collectively in ascertaining whether the manufacturer had made during the sale an average profit of more or less than 42 cents per case on evaporated milk and 59 cents per case on condensed milk.

VII. During the period November 1, 1917, to December 31, 1918, the Mohawk Company sold and delivered to the United States the following quantities of evaporated and condensed milk:

Delivered to—	Cases	Amount paid plaintiff
War Department, evaporated	72,188	$386,477.98
War Department, condensed	3,000	23,940.00
Navy Department (Marine Corps), evaporated	2,500	16,125.00
Navy Department (Navy), evaporated	21,134	102,801.80

During the period November 1, 1917, to December 31, 1918, the Colorado Company sold and delivered to the United States the following quantities of evaporated milk:

Opinion of the Court

Delivered to—	Cases	Amount received
War Department	31,732	$166,307.41
Navy Department	7,000	31,594.00

VIII. An examination of the books of plaintiffs was made by a representative of the Federal Trade Commission. No competent proof was offered by the defendant as to the basis upon which this examination was made, or as to the correctness thereof, and no competent proof was offered as to the correctness of the figures used by the Comptroller General in his advice to the plaintiffs, or as to the basis upon which they were arrived at.

The court decided that the several plaintiffs were entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

These two cases were instituted to recover amounts growing out of overpayments of tax for 1917 and 1918, about which there is no controversy. The controversy in both cases is the same and is whether plaintiffs are indebted to the United States for overpayments made to them for evaporated and condensed milk sold and delivered to the defendant for its military forces during the period November 1, 1917, to December 31, 1918.

The defendant filed a counterclaim in each case. Under these counterclaims it is the contention of the defendant that under the agreement set forth in the findings a profit of not more than 42 cents per case on evaporated and 59 cents per case on condensed milk was to be computed on sales to the Army, Navy, and Marine Corps separately; that the plaintiffs were overpaid in the amounts set forth in the notices mailed to them by the Comptroller General.

Plaintiffs deny these claims of the defendant.

There is no competent proof by the defendant to support the allegations of the counterclaims. The notices from the Comptroller General to the plaintiffs do not prove the correctness of the figures therein used. It appears that the Comptroller General's office obtained the figures shown in

his notices from some one in the Federal Trade Commission, but there is no competent proof as to who compiled these figures or how they were arrived at. For the purpose of showing how the Comptroller General arrived at his figures the defendant offered in evidence certain sheets of paper containing certain totals and summaries which the Comptroller General certified that he had received from the Federal Trade Commission. No one who had anything to do with the preparation of these figures was called to testify as to their correctness or how they were arrived at. The defendant claims that these documents represented an audit on the basis of the Federal Trade Commission cost accounting, as set forth in a pamphlet issued by the Federal Trade Commission, of July, 1917, entitled "Uniform Contracts for Cost Accounting, Definitions and Method." There is no competent proof of this. This court will not accept certified copies as proof of facts as to the correctness of figures contained in documents certified by an official of the Government who has received such documents from some other official, department, or commission. Certification of documents proves only the document itself and permits its introduction in evidence without further proof of identification, but such certification does not establish as a fact the correctness of the statements or figures therein contained. When there is as here a controversy concerning the correctness of the contents of such documents, such contents must be proved by the party relying thereon the same as other facts. We can not accept the sheets certified by the Comptroller General as proof of their contents or of the correctness of his determination.

Inasmuch as we have no competent evidence to establish the correctness of the figures for which the defendant contends, we can not allow any portion of the counterclaim even if the theory of the defendant that the sales of evaporated and condensed milk to the departments of the military services were to be considered separately in arriving at the profit to be paid. While we are of the opinion that the contract was one for the sale of evaporated and condensed milk to the Government and that, under its terms,

the sales to the Army, Navy, and Marine Corps were to be considered collectively in ascertaining whether the manufacturers had made during the period an average profit of more or less than 42 cents per case on the evaporated milk and 59 cents per case on the condensed milk, *Libby, McNeill & Libby* v. *United States*, 65 C. Cls. 64, we need not discuss this feature in view of the lack of competent proof by the defendant to support its counterclaims on its theory.

Judgment will, therefore, be entered in favor of the Mohawk Condensed Milk Company for $8,491.54, with interest at 6 per cent from December 14, 1925, until paid. Act of March 3, 1875, 18 Stat. 481; section 227, U. S. C. A., Title 31.

Judgment will also be entered in favor of the Colorado Condensed Milk Company for $427.71, with interest at 6 per cent from February 16, 1927, until paid. Act of March 3, 1875, 18 Stat. 481; section 227, U. S. C. A., Title 31, *supra.*

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear this case and took no part in the decision thereof.

AMERICAN STANDARD SHIP FITTINGS CORPORATION v. THE UNITED STATES

[No. D-402. Decided November 3, 1930]

On the Proofs

Contracts; Fleet Corporation; authority to contract; implied authority.—Where suit against the United States is on an alleged contract, and it is shown that the officer acting for the Government was without authority to contract, there is no contract, and none can be implied. Where the contract is alleged to be with the Fleet Corporation, knowledge on the part of plaintiff of the officer's actual lack of authority precludes application of the doctrine of implied authority.

Statute of limitations.—The statute of limitations, sec. 156, Judicial Code, is jurisdictional, and begins to run when suit may first be brought.

The Reporter's statement of the case:

Mr. W. W. Ross for the plaintiff. *Mr. James W. Good* was on the brief.

Mr. James A. Cosgrove, with whom was *Mr. Charles F. Kincheloe*, for the defendant. *Mr. Assistant Attorney General Herman J. Galloway* was on the brief.

The court made special findings of fact, as follows:

I. The American Standard Ship Fittings Corporation, plaintiff herein, was organized under the laws of the State of New York on September 17, 1918, by Charles P. Albee, James G. Godfrey, and M. K. Newman for the purpose of manufacturing ship fittings and supplies. Fifty per cent of the stock was owned or controlled by Messrs. Albee and Godfrey, and fifty per cent by Mr. Newman. Mr. Albee was president, Mr. Newman, vice president and general manager, and Mr. Godfrey, secretary and treasurer. M. K. Newman, up to the time of the organization of the plaintiff corporation, was an official of the Fleet Corporation, occupying a desk in the office of E. S. Kiger, chief traffic engineer. His title was sanitary engineer.

II. The Albee & Godfrey Co., Inc., a corporation organized under the laws of the State of New York, with its plant in Brooklyn, New York, was engaged in the manufacture of architectural ironwork for buildings—its entire interest was owned by Messrs. Albee and Godfrey.

III. The United States Shipping Board Emergency Fleet Corporation was organized under the general corporation laws of the District of Columbia by the United States Shipping Board, pursuant to authority conferred by an act of Congress approved September 7, 1916, for the purpose, among other things, of building, selling, buying, chartering, and operating ships and purchasing and selling shipyards and materials and supplies connected therewith, as an agent of the United States. Its functions have been exercised in connection with public and not private enterprises and for the carrying out of the purposes of the shipping act, and it has acted directly and solely as agent for the President of the

United States, pursuant to an Executive order of July 11, 1917.

IV. Prior to the organization of the plaintiff corporation, the Albee & Godfrey Co., Inc., had negotiated with the Fleet Corporation for orders for the manufacture of fittings and supplies for ships. After the incorporation of the plaintiff, the negotiations were carried on in the name of the plaintiff corporation and such orders as were secured were allocated by the plaintiff officials to the Albee & Godfrey Co., Inc., and/or other manufacturing firms.

V. All contracts for the manufacture of equipment and purchase of material for the construction of ships were, by written instructions of the vice president of the Fleet Corporation, dated August 15, 1918, required to be made through the purchasing department of the Emergency Fleet Corporation. This order was not thereafter rescinded.

VI. During the period from August, 1918, to October, 1919, formal orders for numerous ship fittings of various sorts were placed with the plaintiff corporation, at the instigation of Mr. E. S. Kiger, the chief traffic engineer in the office of the district superintendent of New York, either through the district representative of the general purchasing office or by the transmittal of orders received direct from the ship contractors; all such orders, except those now the subject of the present claim, had been duly authorized by orders of the purchasing department, and were fully executed and paid for.

VII. Early in August, 1918, the Albee & Godfrey Co., Inc., was requested by the office of the chief traffic engineer to submit bids for the manufacture and installation of a certain type of mastlight brackets, vertical ladders, rail and awning stanchions, etc., in connection with which it was stated that "we are in the market for about 50 sets." In reply, the Albee & Godfrey Co., Inc., submitted to the chief traffic engineer a written estimate for the manufacture of the equipment noted, stated that the price quoted was based upon the price for fabricating material for fifty ships at one time, and agreed to start delivery within three weeks after receipt of the raw material.

VIII. Thereafter Messrs. Albee, Godfrey, and Newman conferred with the chief traffic engineer in relation to the proposal submitted and the status of the plaintiff, a newly formed corporation. Kiger, among other things, stated that there was an increasing demand for ship materials and supplies, and that any company ready, able, and willing to furnish such on short notice and at satisfactory prices, would get all the orders it could handle.

In the furtherance of a proffer of assistance on his part, Kiger circularized the several district offices advising them that the plaintiff corporation was equipped to furnish the needed ship materials and supplies and suggesting that they place their orders with that company, and copies of these letters were sent to the plaintiff.

IX. Without waiting for formal orders from the Fleet Corporation, or the contractors, the plaintiff placed with the Albee & Godfrey Co., Inc., a formal written order for fifty and another for five sets of rails and awning stanchions and one for 15 sets of crow's nests.

X. On or about October 11, 1918, Kiger, the chief traffic engineer, was retired from the employ of the Emergency Fleet Corporation.

XI. Between the date of the first verbal orders and the date Kiger left the Fleet Corporation, Godfrey and Newman had from time to time asked Kiger for written orders from the purchasing department confirming the verbal orders received but were put off. Later the plaintiff endeavored to have the same verbal orders confirmed by the purchasing department but without success.

XII. On October 29, 1918, the plaintiff sought confirmation from the district superintendent of construction and written orders covering the verbal orders of Kiger, but was advised in reply "that verbal orders for material for ship fittings, materials, etc., not confirmed by written orders signed by the district purchasing office of the E. F. C. are of no weight."

XIII. As a result of dissatisfaction in the management of the corporation's affairs, a written agreement dated September 26, 1919, was entered into by Newman, Albee, and Godfrey, individually, for the sale to Newman by Albee and

Godfrey of their shareholdings in the plaintiff corporation in consideration of the payment of a stipulated sum and the assignment to Albee and Godfrey, as individuals, by the plaintiff corporation of its claim against the Emergency Fleet Corporation—

"arising out of what is known as the 'verbal' orders * * * issued by E. S. Kiger, chief traffic engineer of the United States Shipping Board Emergency Fleet Corporation * * *."

Pursuant to the foregoing agreement, the plaintiff corporation under date of October 14, 1919, attempted to assign to Albee and Godfrey as individuals the before-mentioned interest and made further provision in restriction of such efforts of settlement as the plaintiff corporation might undertake.

XIV. Thereafter a claim was filed on behalf of Albee & Godfrey Co., Inc., with the United States Shipping Board Emergency Fleet Corporation; it was investigated and considered by many officials and departments of the Shipping Board and in April, 1920, was referred to the construction claim board, and by that board sent to the district adjuster in New York, where hearings were had and testimony taken.

On September 12, 1923, the district adjuster filed a written report with the chief counsel of the United States Shipping Board Emergency Fleet Corporation, recommending payment. The claim, however, was finally denied by the Fleet Corporation.

XV. After the assignment of the present claim, but prior to the facts last narrated, the plaintiff sold and transferred, under date of March 30, 1920, to the American Standard Ship Fittings Corporation, of Delaware, newly organized, its good will, stock in trade, fixtures, books, outstanding accounts, etc.

Shortly thereafter the plaintiff corporation was duly dissolved under the laws of the State of New York, and on April 7, 1920, a certificate of dissolution was issued by the secretary of state of the State of New York.

Section 105, paragraph 8, of the New York State corporation law relating to dissolved corporations, in force on March 30, 1920, and continuously since that date, provides:

"Such corporation shall continue for the purpose of paying, satisfying, and discharging any existing liabilities or obligations, collecting and distributing its assets, and doing all other acts required to adjust and wind up its business and affairs and may sue and be sued in its corporate name."

XVI. Shortly after the organization of the Delaware corporation, financial difficulties were experienced and a petition in bankruptcy filed against it; the claim presented here was not listed among the bankrupt's assets and no creditors' claim was filed by the Albee & Godfrey Co., Inc.

XVII. The counterclaim of the defendant against the plaintiff consists of the stipulated damages for delays in completing contracts for repairs to the S. S. *South Bend* and the S. S. *Minnesota*, entered into and completed during the early part of 1919.

The written contract for repairs to the S. S. *South Bend* required that the work be completed by April 18, 1919, with a provision that for each day's delay beyond the date specified the sum of $1,000 would be deducted from the contract price of $147,798 as liquidated damages.

Two supplemental written contracts were entered into extending the time for completion of the work to April 22, 1919.

First and final payments were provided to be made only upon the completion of all work thereunder and the inspection and acceptance thereof by the officer in charge or his representative. Upon completion of the repairs there became due the plaintiff the sum of $147,798, subject to a penalty of $3,000 for delay in excess of time over the contract period.

There is no evidence as to actual delivery, as to the time consumed in inspection, or as to clerical error in computing the final sum due.

XVIII. The contract for repairs on the S. S. *Minnesota* required that the work be completed on March 10, 1919, with the added provision that there should be deducted for each day's delay beyond the date specified, as liquidated damages, the "daily charter cost of ship to the Government, fuel, water, and running supplies consumed, wages of crew if not included in charter cost, and any other financial loss resulting to the United States through such delay."

A supplemental agreement dated March 10, 1919, extended the time for completing the work to March 20, 1919.

On February 25, 1919, a second written contract was entered into for certain additional repairs to this vessel at a cost of $6,386, the work to be completed on March 29, 1919.

On March 17, 1919, a second supplemental agreement to the original contract was entered into providing for extra work in connection with changing the oil-burning system to be done at an additional cost to the Government of $9,280, with no provision for an extension of time for delivery beyond March 20, 1919, as fixed by the first supplemental agreement dated March 10, 1919.

There is no evidence as to the actual date of delivery, as to the time consumed in inspection, or as to any other fact tending to discredit the certificates of the representatives of the officer in charge that the plaintiff was not chargeable with any delay.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff, a New York corporation, sues to recover certain items of loss, predicating its right of recovery upon the act of June 15, 1917 (40 Stat. 182), wherein just compensation is to be awarded to contractors whose contracts were canceled or suspended during the war. The material facts bring the case to one vital issue, and that is the question of the authority of the Government official who made the contracts to bind the Government. Both plaintiff and defendant agree to this statement and the briefs of counsel are directed to it.

The Shipping Board Emergency Fleet Corporation, acting in pursuance of the delegated authority of the President to act—Executive order of July 11, 1917—was engaged in carrying out the war program to build wooden ships. A district office of the Fleet Corporation was to this end functioning in New York City. The Albee & Godfrey Co., a New York corporation, engaged in the manufacture of architectural ironwork for buildings, had on September 17, 1918, negotiations pending for contracts to supply certain

materials and supplies to the Fleet Corporation, whose present needs in this respect were vast and urgent. On September 17, 1918, the plaintiff corporation was organized. Charles P. Albee and James G. Godfrey, of the Albee and Godfrey corporation, owned one-half of the stock and M. K. Newman the remaining half. Immediately following the organization of the plaintiff corporation the pending negotiations of the Albee & Godfrey Co. were conducted by the plaintiff corporation and during the period of time involved in this suit numerous oral orders were given the plaintiff for the materials and supplies for the value of which, together with profits, this suit is brought. The orders relied upon were given to plaintiff by E. S. Kiger, an official of the Fleet Corporation, subordinate to the district superintendent of New York, whose duties were embraced within the title "Chief Traffic Engineer." It is not disputed, and may not be, that a positive order from the vice president of the Fleet Corporation dated August 15, 1918, was in force, by the terms of which all contracts for the purchase or manufacture of materials and supplies were to be made only through the purchasing department of the Fleet Corporation. The plaintiff was well aware of this limitation upon officers of the Fleet Corporation to enter into contracts, for during the period of time from August, 1918, until October, 1919, several formal orders from the Fleet Corporation were placed with it in compliance with the order of August 15, 1918, and the materials and supplies furnished were paid for. There is no doubt that when the Fleet Corporation declined to recognize plaintiff's contracts the materials, the value of which is the subject-matter of this suit, were on hand and in the possession of the plaintiff and its subcontractor. No controversy obtains as to this fact. The plaintiff concedes that all the orders for the above materials were verbal orders given directly by Kiger and were neither confirmed nor issued through the purchasing department of the Fleet Corporation. Authority to bind the Government by contract is an indispensable prerequisite to an enforceable contract. The rule as thus stated is conceded and we need not cite a long list of familiar authorities to sustain it. Even under the Dent Act (40 Stat. 1272) authority to enter into informal

contracts made during the war under emergency conditions must be proven. *Jacob Reed's Sons* v. *United States*, 273 U. S. 200. An elaborate brief upon the part of the plaintiff seeks to overcome this obstacle to a recovery by reliance upon the doctrine that where an agent of a corporation exercises authority to contract with the knowledge and acquiescence of the officials of the corporation, and acts within the scope of the corporation's business, the corporation is bound, irrespective of positive authority upon the part of the agent, to act. We do not have to meet such a contention in this case because the record precludes the possibility of its assertion.

Newman, the official representative of the plaintiff in charge of negotiations for and the procurement of contracts from the Fleet Corporation, was a former official of the corporation and, of course, familiar with its proceedings. In addition to this, the record indisputably discloses that the plaintiff, through Newman, repeatedly sought from Kiger written orders from the purchasing department confirming Kiger's oral ones, and did himself directly seek the confirmation of the purchasing department. To ascribe to Newman and Kiger a lack of knowledge of the limitations of Kiger's authority to contract for the amount and quantity of supplies involved herein would be contrary to all the evidence in the record. The Fleet Corporation was not investing authority upon a subordinate official of the same to enter into contracts, either written or oral, *ad libitum*.

On September 26, 1919 (Finding XIII), Newman, Albee, and Godfrey, individually, executed a written contract by the terms of which Newman acquired the interests of Albee and Godfrey in the American Standard Ship Fittings Corporation, i. e., the New York Corporation. As a part consideration for the above sale the corporation assigned to Albee and Godfrey the present claim against the United States, and the Albee & Godfrey Co., Inc., later on filed a claim with the Fleet Corporation for the sums herein demanded. The claim was, after investigation, denied. The assignment of the claim to Albee and Godfrey is under section 3477, Revised Statutes, null and void.

Opinion of the Court

"SEC. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

On March 30, 1920, Newman organized under the laws of Delaware a second corporation, known as the American Standard Ship Fittings Corporation, duplicating the name of the New York corporation, and thereafter by bill of sale Newman, acting for and on behalf of the New York corporation of which he was then the sole stockholder, sold and transferred to the Delaware corporation all the assets of the New York corporation, and proceeded under the laws of New York to dissolve the latter and surrender its charter.

On February 4, 1927, the Delaware corporation filed a petition to intervene, in which facts are alleged upon which ownership of the claim is asserted, predicating its right to prosecute this suit in virtue of the decision of the Supreme Court in *Seaboard Air Line Railway* v. *United States*, 256 U. S. 655.

The defendant has filed a motion to dismiss the intervening petition. The statute of limitations is invoked. Section 156, Judicial Code. We think the defendant's motion should be allowed. The statute of limitations which is jurisdictional in this court—*United States* v. *Wardwell*, 172 U. S. 48, 52—begins to run when a suit may first be brought under our jurisdictional act. *Rice* v. *United States*, 122

U. S. 611, 617. As early as October 29, 1918, the real parties in interest were expressly notified that verbal orders for materials or supplies unconfirmed by written orders from the district purchasing office were of no force and effect. Again, on March 30, 1920, this claim, then outstanding as alleged in the petition, was, as alleged by the Delaware corporation, by operation of law transferred to it. The intervening petition of the Delaware corporation was not filed until February 4, 1927, almost seven years after the organization of the same and almost eight years after the claim accrued, whereas the statute of limitations prescribes a six-year limitation. We think the proper plaintiff is in court, i. e., the New York corporation. (Finding XV.) It was never the intention of the plaintiff to assign this claim to the Delaware corporation; it was not listed as one of the assets of the New York corporation conveyed by the bill of sale, and the Delaware corporation did not regard the claim as assigned to it, for when the latter was in the bankruptcy courts this claim was not scheduled as one of its assets.

The plaintiff filed its original petition in this case on June 24, 1924, and it was not until almost three years thereafter that the intervening petition was filed. No evidence was taken upon behalf of the intervenor and nothing appears of record in its behalf except the filing of its intervening petition. No extended brief appears in its behalf and no counsel appeared in argument. The defendant interposes a counterclaim. The evidence to sustain the same is not sufficient and we so find.

The petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge,* concur.

WHALEY, *Judge*, did not hear this case and took no part in its decision.

CHARLES DEF. CHANDLER v. THE UNITED STATES

[No. H-382. Decided November 3, 1930]

On the Proofs

Army pay; retired officer; unauthorized appointment to Reserve Corps; pay for actual services; mileage allowance as reserve officer; computation of longevity pay; period of retirement.—(1) Where plaintiff's status as a retired officer of the Regular Army was fully known to the officials of the War Department, the Army order which called him as a reserve officer to active duty for training identifying him as a "lieutenant colonel, U. S. Army, retired," and he performed services as a reserve officer in good faith and in accordance with orders, he can not be denied pay on the ground that his previous appointment to the Reserve Corps as a colonel was void because not authorized by the national defense act.

(2) His mileage allowance was limited to that of a reserve officer.

(3) He was not entitled to longevity pay provided in the act of June 10, 1922, for a colonel of the Reserve Corps computed by including the period of retirement.

The Reporter's statement of the case:

Mr. Louis B. Montfort for the plaintiff.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant. *Mr. Assistant Attorney General Herman J. Galloway* was on the brief.

The court made special findings of fact, as follows:

I. From April 25, 1901, to October 18, 1920, plaintiff was an officer of the Regular Army on the active list, and on May 15, 1917, reached the permanent grade of lieutenant colonel in the Regular Army and the temporary grade of colonel in the Signal Corps of the Army on August 5, 1917.

II. October 18, 1920, he was a lieutenant colonel in the Air Service, Regular Army, and was retired in that rank pursuant to section 1251 of the Revised Statutes, act of August 3, 1861, 12 Stat. 290, because of incapacity for active service.

On November 16, 1923, pursuant to presidential appointment and commission, plaintiff was appointed and commissioned a colonel in the Air Corps (then Service) Reserves, pursuant to section 37 of the national defense act, as amended, being the act of September 22, 1922, 42 Stat. 1033.

III. February 11, 1927, plaintiff received from the War Department, at Washington, Paragraph 15, War Department, Special Orders, No. 33, dated February 9, 1927, as follows:

"By direction of the President, Colonel Charles deF. Chandler, Air Corps Reserve (O-186267), (Lieutenant Colonel, United States Army, retired), Washington, D. C., is with his consent ordered to active duty, effective February 13, 1927. On that date he will report in person to the Chief of Air Corps, this city, for training. Colonel Chandler will rank from July 3, 1924. He will be relieved from duty February 27, 1927, on which date he will revert to inactive status. Pay and allowances FD 598 2717 A 3190-7.

"By order of the Secretary of War:

"C. P. SUMMERALL,
"*Major General,*
"*Chief of Staff.*

"Official:
"ROBERT C. DAVIS,
"*Major General,*
"*The Adjutant General.*"

IV. February 13, 1927, in compliance with this order, plaintiff reported for duty as colonel in the Air Corps Reserve to the Chief of the Air Corps of the Army at Washington, and thereafter continued on active duty pursuant to said order until February 27, 1927.

On February 15, 1927, while on said active duty, pursuant to the aforesaid order, the plaintiff received an order by direction of the Chief of the Air Corps of the U. S. Army, dated February 15, 1927, as follows:

"1. Under authority contained in Army Regulations 35-4890, you will proceed, by rail, on or about February 16th, from Washington, D. C., where you are now on active duty, to Fort Worth, Texas, via McCook Field, Dayton, Ohio, and Scott Field, Illinois, on temporary duty in connection with matters relating to helium and for conference at those places regarding helium, etc., and upon completion,

return by rail, to your proper station, Washington, D. C., and comply with your present active duty orders.

"2. The travel directed is necessary in the military service and is a proper charge to A C 1 P 5040 A 80–7.

"By order of the Chief of Air Corps:

"JOHN H. JOUETT,
"*Major, Air Corps,*
"*Chief, Personnel Division.*"

V. On February 15, 1927, plaintiff presented this order to the quartermaster supply officer of the Army at Washington and the supply officer thereupon issued and delivered to him official transportation requests for the enjoined transportation by rail.

VI. From February 16, 1927, to the twenty-seventh day of active duty as a colonel in the Air Corps Reserves, pursuant to War Department, Special Orders, No. 33, of February 9, 1927, and in compliance with an order by direction of the Chief of the Air Corps dated February 15, 1927, plaintiff traveled on official duty in the military service without troops from Washington, D. C., via McCook Field, Ohio, and Scott Field, Illinois, to Fort Worth, Texas, and back to Washington, a total distance of 3,288 miles, using the Government transportation issued and delivered to him.

VII. February 28, 1927, plaintiff made and presented to the finance officer of the United States Army at Washington, a claim in proper form for the allowance for mileage under the act of June 1, 1926, 44 Stat. 680, for the travel so ordered as aforesaid in the amount of 8 cents per mile less 3 cents per mile for transportation furnished by the United States through the quartermaster supply officer, leaving a net amount claimed by the plaintiff of 5 cents per mile for 3,288 miles, aggregating a total of $164.40.

Thereafter, on May 27, 1927, the finance officer, acting in accordance with a decision rendered by the Comptroller General, A–17658, of May 19, 1927, rejected plaintiff's claim for said allowance for mileage and has ever since failed and refused to pay the same.

The plaintiff actually performed service for the War Department in good faith and in accordance with the orders of the proper officials.

Opinion of the Court

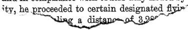
VIII. In computing the pay of plaintiff for the period February 13, 1927, to February 27, 1927, a period of 15 days, he was allowed service for longevity purposes of over twenty-one years and was paid the longevity pay for said period the sum of $225.

Plaintiff's first appointment in the permanent service was in a grade below that of captain in the Army. At the time of his retirement, on October 18, 1920, he had service to his credit of 20 years 3 months and 24 days, with no record of active duty subsequent thereto and prior to February 13, 1927. The pay of a colonel of the Reserve Corps with over 20 years and less than 21 years' service for 15 days amounts to $216.67.

The court decided that plaintiff was entitled to recover, in part.

LITTLETON, *Judge*, delivered the opinion of the court:

The plaintiff was regularly retired from the Army as a lieutenant colonel October 18, 1920, and thereafter received the retired pay of his rank. November 16, 1923, he was appointed a colonel in the Air Corps (then Air Service) Reserves, pursuant to the provisions of law and, thereafter, by due authority on February 9, 1927, was ordered to active duty as a reserve officer for training from February 13 to February 27, 1927. In the course of this training servi-
and in compliance with orders duly issued by pro-
ity, he proceeded to certain designated flyi-
-ling a distance of 3,2-



Opinion of the Court

1922, 42 Stat. 725, to 4 cents per mile, and such amount is paid after deducting 3 cents per mile for transportation requests as furnished by the quartermaster.

The question in this case is the basis of the plaintiff's travel allowance for the services rendered, whether under the statutes governing transportation allowance of the Regular Army or to officers of the Reserve Corps.

The defendant also questions the right to any allowance on the ground that plaintiff's appointment as a colonel in the Reserve Corps was void because unauthorized under section 37 of the national defense act, as amended (42 Stat. 1033), and subsection 37, as amended (41 Stat. 778), which limited appointment, according to defendant's contention, to former officers of the Regular Army, etc., but not to officers in the regular service, of which a retired officer is included.

We need not discuss the validity of plaintiff's commission. It was issued in due manner and form and plaintiff's status as a retired officer of the Regular Army was fully known to the officials of the War Department. The order No. 33 of February 9, 1917, calling plaintiff as a reserve officer to active duty for training identified him as a "lieutenant colonel, U. S. Army, retired," and he performed the military services as a reserve officer in good faith and in accordance with the orders of the proper officials of the War Department. He [illegible]titled to pay. *Bennett* v. *United States*, 19 C. Cls. 379. [illegible]*d States*, 19 C. Cls. 389. *Royer* v. *United* [illegible]; 268 U. S. 394.

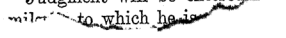
[illegible]tion to[illegible]

Army. Act of June 10, 1922, 42 Stat. 627. The act of June 30, 1922, 42 Stat. 725, also provides that "Mileage allowance to members of the Officers' Reserve Corps when called into active service for training for fifteen days or less shall not exceed 4 cents per mile." Mileage at 4 cents per mile less 3 cents per mile for transportation furnished leaves $32.88 as the amount to which plaintiff is entitled under the statutes.

Defendant insists that if plaintiff is entitled to recover for mileage the amount should be reduced by $8.33, representing the difference between $225 paid to the plaintiff for the fifteen days' service mentioned and $216.67 which it is claimed is all that he was entitled to receive under the statute.

In submitting his pay and allowance account to the War Department plaintiff included in his length of service, for which he claimed pay and allowance for the period elapsing since his retirement from active service, October, 1920. At the time of his retirement, October 18, 1920, plaintiff had service to his credit of only 20 years, 3 months, and 24 days, and, with the exception of the fifteen days' service involved herein, he had no record of other active duty. The period of retirement may not be included for the purpose of longevity pay. Therefore, under the act of June 10, 1922, 42 Stat. 625, plaintiff was entitled only to the pay of a colonel of the Reserve Corps with over 20 years and less than 21 years' service for fifteen days amounting to $216.67. Pl[illegible]
tiff was, therefore, overpaid in the amount of [illegible]

Judgment will be entered in [illegible]
[illegible] to which he is [illegible]



ACME COAL COMPANY v. THE UNITED STATES

[No. H-299. Decided November 3, 1930]

On the Proofs

Income and profits tax; agreement to pay vendor tax on profits of sale; treatment as accrued income; adjustment of accrual to reflect actual income.—(1) Where in a contract of sale the purchaser agrees to pay the seller the tax on the profits of the sale, the amount of the tax constitutes a part of the profits, is income accruing to the seller during the taxable year, and as such is itself taxable.

(2) Where, in addition, an amount in discharge of the purchaser's obligation is paid subsequent to the taxable year less than that used by the Commissioner of Internal Revenue in calculating his total assessment, the sum to be used as an accrual is subject to adjustment in order to reflect the actual income.

The Reporter's statement of the case:

Smith & Moore for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant.

The court made special findings of fact, as follows:

I. The Acme Coal Company is a corporation duly cre-[illegible]ted and existing under the laws of the State of Wyoming, [illegible]ncipal office and place of business at Sheridan, [illegible] the plaintiff was engaged [illegible] mine[illegible]

Reporter's Statement of the Case

it leases approximately 1,620 acres with the right to mine the coal under the said lands, together with improvements, town sites, tipples, railroad tracks, waterworks, mining supplies and equipment, constituting its operating coal mines, and is desirous of selling the same; and whereas the purchaser is desirous of buying all of the said property of The Coal Company; and

"WHEREAS the purchaser is the assignee of a certain option entered into the 30th day of August, 1919, by and between The Coal Company and Robert H. Walsh, of the city and county of Sheridan, Wyoming, the said Robert H. Walsh having assigned to the purchaser all of his rights under said option agreement; and

"WHEREAS the purchaser as such assignee of Robert H. Walsh has exercised the option given in said option agreement of August 30, 1919, to purchase said property of the Acme Coal Company in accordance with all the terms and conditions contained in said option agreement, same being attached hereto and its terms and conditions being made a part hereof the same as if incorporated in this agreement; and

"WHEREAS under the terms and conditions of said option agreement it is provided that Robert H. Walsh, or his assigns, shall pay the sum of one million ($1,000,000) dollars to The Coal Company for all of its property and assets of every kind, including leases, improvements, machine
equipment, mine horses, trade names, trade-marks
good will, saving and excepting, however, al
and in bank, Government bonds, war-sa
ury notes of the United States, oil st
stock (except the mine horses abov
and bills receivable, and supplies
of such supplies as shall be ne
of the company's mine for o
Company as of the 30th da
subsequent to said date by

"WHEREAS it is further
of August 31st, 191
in addition to
red to, shall
of mone
asse
or
r

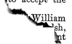
upon the day of exercise of the option contained in said agreement to deliver to The Coal Company sufficient security in the form of a bond or pledge or other security to amply guarantee to The Coal Company the payment of said tax, if any; and

"WHEREAS by the terms of said option agreement of August 30, 1919, the said Walsh, or his assigns, are further obligated by the terms of said agreement to pay to The Coal Company such sums as the latter shall actually expend between August 30, 1919, and December 31, 1919, upon improvements made to the Coal Company's property including additional machinery, development, house construction, etc., between the said dates as shown by the Acme Coal Company's books; and

"WHEREAS it is further provided in said option agreement of August 30, 1919, that in case of exercise by Walsh, or his assigns, of the option contained therein, possession of the residences now being constructed for the occupancy of Ora Darnall, of The Coal Company, and the houses now occupied by W. C. Craig, T. G. Kessinger, and W. H. Maddorn shall not be demanded until June 1, 1920, and they shall be allowed to remain in possession of their respective houses without further rental charge until that time; and

"WHEREAS by the terms of the option agreement of August 30, 1919, The Coal Company has agreed that the prop- [illegible] optioned to be sold in said agreement shall be conveyed [illegible] Walsh, or his assigns, free and clear of and from all [illegible]brances whatsoever; and

[illegible] Coal Company now has on hand on its [illegible] supplies in excess of the thirty (30) [illegible]o be sold by it and not included in [illegible]ase price provided in said option [illegible]of selling said surplus and the [illegible] the same; and



[illegible]y is now a party to certain [illegible]al, purchase of power, and [illegible]ildings for the Sheridan [illegible]es to assign to the [illegible] to accept the

[illegible] William [illegible]sh, [illegible]nt

pose of carrying out the provision of said option agreement of August 30, 1919, between The Coal Company and Robert H. Walsh, agree as follows:

"1. The Coal Company acknowledges due and proper exercise by Francis S. Peabody as assigns of the option given to Robert H. Walsh in the agreement between the said Robert H. Walsh and The Coal Company, dated August 30, 1919.

"2. The purchaser will, on or before the 31st day of December, 1919, deposit to the credit of The Coal Company in the Union Trust Company of Chicago, Illinois, the sum of one million ($1,000,000.00) dollars payable to The Coal Company as soon as the latter has delivered to the purchaser the necessary instruments granting, bargaining, selling, and conveying to the purchaser, free and clear of and from any and all liens and encumbrances of any sort whatsoever the property herein described and provided in said option agreement to be sold for the sum of one million ($1,000,000.00) dollars.

"3. In addition to the payment above referred to of the sum of one million ($1,000,000.00) dollars, the purchaser, within a reasonable time after the inventory value of the improvement made in The Coal Company's property herein provided to be sold to the purchaser and also the inventory value of the excess supplies of The Coal Company now on hand has been ascertained and agreed upon between the purchaser and The Coal Company, will deposit in the Union Trust Company of Chicago, Illinois, to the credit of The Coal Company, a sum equal in amount to the said sum so ascertained and agreed upon.

"4. The purchaser agrees that it will within five (5) days from the date of this agreement deposit with the Union Trust Company of the city of Chicago, Illinois, for delivery to The Coal Company a bond executed by the National or American Surety Company in the penal sum of two hundred thousand ($200,000.00) dollars guaranteeing the payment by the purchaser of any income or excess-profits tax that may be assessed against The Coal Company by the United States as a result of the sale of the properties of The Coal Company herein provided to be sold, and will also deposit at the same time the bond of Mr. Francis S. Peabody for the same amount containing a similar guarantee. Said bonds to be delivered to The Coal Company upon receipt from it to the purchaser of instruments conveying to the purchaser the property of The Coal Company herein provided to be sold free and clear of and from all liens and encumbrances.

Reporter's Statement of the Case

"5. The Coal Company agrees to grant, bargain, sell, and convey to the purchaser, free and clear of and from all liens and encumbrances of any kind whatsoever, all of its property herein above described provided to be sold by it to the purchaser by the option agreement of August 30, 1919, and herein described. And The Coal Company agrees to deliver possession thereof to the purchaser on January 1, 1920, and on December 31, 1919, to deliver to the purchaser all instruments necessary to effect such conveyance, sale, and transfer.

"6. The Coal Company agrees to assign to the purchaser, and the purchaser agrees to assume the obligations of, that certain contract between The Coal Company and the Sheridan County Electric Company for the furnishing of power to The Coal Company and the sale of coal by The Coal Company to said electric company; also all outstanding contracts to date covering the sale of coal to industrial plants, and also that certain contract between The Coal Company and the Sheridan County Electric Company for the construction by The Coal Company and lease by it to the Sheridan County Electric Company of five (5) buildings now under construction.

"7. The instruments of conveyance and transfer when actually executed shall be effected as of January 1, 1920.

"8. This agreement shall be binding upon the successors and assigns of the coal company and the heirs, executors, administrators, and assigns of the purchaser.

"IN WITNESS WHEREOF F. S. Peabody has hereunto set his hand and seal and the Acme Coal Company has caused this instrument to be executed by its president and its corporate seal to be hereunto affixed, attested by its secretary, all on the 31st day of December, 1919.

"(Signed) F. S. PEABODY, (SEAL.)
"By PRESTON DAVIES,
"*Attorney in Fact.*

"ACME COAL COMPANY,
"By (Signed) A. K. CRAIG,
President.

"Attest:
"(Signed) W. G. CRAIG, (SEAL.)
"*Secretary.*"

Pursuant to said agreement, said bonds were executed, and thereafter, in 1924, as will hereinafter more fully appear, the plaintiff received in full settlement of the agreement and bonds for reimbursement for taxes herein above mentioned, the sum of $44,639.35. The plaintiff received in 1920 as

profit on said sale independent of agreement for reimbursement for taxes the sum of $231,889.41.

III. On May 20, 1921, having duly received an extension of time in which to do so, the plaintiff, pursuant to law, made a return of income earned by it in the year 1920, including profit realized on the sale of its said assets to Francis S. Peabody in the sum of $82,988.37, and filed such return with the collector of internal revenue at Cheyenne, Wyoming.

IV. Plaintiff's original income and profits tax return for the year 1920 having shown taxes due from it of $12,617.80, payment thereof was made to the collector of internal revenue at Cheyenne, Wyoming, on May 20, 1921.

Thereafter the Bureau of Internal Revenue by the letter of the deputy commissioner dated March 10, 1923, determined an additional tax liability on the part of plaintiff for the year 1920 of $70,032.54. Thereafter, on March 31, 1924, the Bureau of Internal Revenue again redetermined said tax liability, and in addition to said additional tax of $70,032.54 determined a further additional tax liability of $18,299.91. In said letter of March 31, 1924, and in redetermining said tax liability, which was fixed at a total for the year 1920 of $100,950.25, said Bureau of Internal Revenue calculated as part of the net income of plaintiff the sum of $66,896.03, which it asserted to be the amount due plaintiff as a result of the agreement of the said Francis S. Peabody, herein above referred to, to pay income and excess profits taxes accruing to it on account of the sale aforesaid. On September 9, 1924, said additional sums of $70,032.54 and $18,299.91 were paid by the plaintiff to the collector of internal revenue at Cheyenne, Wyoming.

V. Thereafter, and on the 29th day of October, 1924, plaintiff duly filed claim for refund of $20,511.77 of said tax, that being the amount of tax arising from the inclusion in plaintiff's net income for said year of said alleged income of $66,896.03. Said claim was duly and properly verified as required by law.

Thereafter, and on February 18, 1926, in response to said claim for refund, the Bureau of Internal Revenue redetermined the tax liability of plaintiff for the year 1920,

and in such redetermination changed its computation of income alleged to have been received as a result of the said Peabody guaranty to pay taxes aforesaid, from the sum of $66,896.03, hereinbefore recited, to the sum of $44,639.35, which was and is the correct amount of money received by the plaintiff as a result of said agreement of the said Peabody to pay such taxes. Said letter of February 18, 1926, recomputed the tax liability of the plaintiff in the total sum of $94,085.39, instead of $100,950.25, and granted said claim for refund of $20,511.77 in the sum of $6,864.86, and denied the same in the sum of $13,646.91. Said claim for refund was denied and rejected and the payment thereof refused, and the payment thereof has never been made and is still refused, except of the said sum of $6,864.86.

VI. The true tax liability of the plaintiff, if there is included in its net income for the year 1920 the sum of $66,896.03, as part of its profit on said sale resulting from the Peabody agreement to pay the tax on said profit, is the sum of $100,950.25; its true tax liability, if there is included in its net income for the year 1920 the sum of $44,639.35, as part of its profit on said sale resulting from the Peabody agreement to pay the tax on said profit, is $94,085.39; the true tax liability, if nothing is included in its net income for the year 1920, on account of the agreement to the said Francis S. Peabody to pay the tax on said profit, is $80,438.48.

VII. The said Francis S. Peabody assigned his contract with the plaintiff hereinabove quoted to Sheridan Wyoming Coal Co., which became the purchaser of plaintiff's property under the terms of said contract, and plaintiff and said Sheridan Wyoming Coal Co. disagreed as to the amount due plaintiff on account of said agreement hereinabove appearing. After discussion they referred the matter for settlement to arbitrators, who fixed the figure at $44,639.35, and in the year 1924 there was paid to the plaintiff by the said Peabody's successors, on account of the said Peabody's agreement to pay said tax, the sum of $44,639.35. Said Peabody was at all times fully able to pay any amount for which he was legally liable under said contract.

Books of the plaintiff were kept on an accrual basis; no sum was accrued on such books on account of the contract for reimbursement for taxes recited in Finding II hereof, but in the year 1924 the sum of $44,639.35, collected as a result of said contract, was entered in the plaintiff's cash book and from there was credited to its surplus as a reduction of income tax previously charged to surplus.

VIII. No part of the sum of $13,646.91, here sought to be recovered, has been repaid to the plaintiff, and plaintiff has not repaid to the United States the sum of $6,864.85 sought to be recovered by counterclaim herein.

The court decided that plaintiff was not entitled to recover. Counterclaim dismissed.

WHALEY, *Judge*, delivered the opinion of the court:

The plaintiff, a coal-mining company, on August 30, 1919, gave an option to Robert H. Walsh to purchase its entire property; Walsh assigned this option to F. S. Peabody and thereafter, on December 31, 1919, pursuant to the exercise of said option by Peabody, it entered into an agreement to sell its entire property to him, or his assignees, for the sum of $1,000,000, and a certain additional sum based upon the inventory of supplies on hand of the company, and "* * * in addition to the million-dollar purchase price above referred to shall pay to the coal company an additional sum of money equal to the amount of any tax which shall be assessed against it by the United States under any income or excess profit tax law as the result of such sale at said price when any such tax shall have been duly assessed and become due and payable from the said coal company to the United States." Bonds were executed by a surety company, and Peabody also, guaranteeing the payment of this additional amount. Peabody transferred his contract to the Sheridan Coal Company, and it became the purchaser.

An extension of time having been granted by the Bureau of Internal Revenue, the plaintiff duly made its income and profits tax return for the year 1920 on May 20, 1921. In this return it reported its operating net income at $46,297.65 and the net profit realized on the sale of its assets of

$82,988.37, making a total net income of $129,286.02. The total tax shown by the return was $12,617.80, which amount was paid by plaintiff at the time of making the return. In arriving at this total tax no sum was included to cover the income and profit taxes due the Government and to be paid by the purchaser. The books of the plaintiff were kept on an accrual basis but it did not enter on its books of account any sum representing the contract for reimbursement for taxes until the year 1924, when the sum of $44,639.35, collected as a result of said contract, was entered upon its cash book and from there credited to its surplus as a reduction of income tax previously charged to surplus. On March 10, 1923, the Commissioner of Internal Revenue determined an additional tax liability on the part of plaintiff for the year 1920 of $70,032.54, and thereafter, on March 31, 1924, the commissioner again redetermined said tax liability and levied a further assessment of $18,299.91. These amounts were paid by the plaintiff on September 9, 1924. In determining these amounts the commissioner computed as income for the year 1920 the amount of $66,896.03 to be the sum due, under the agreement, to discharge all taxes to the Government. Having paid its additional taxes, plaintiff filed a claim for refund in the sum of $20,511.77, being the amount of tax arising from the inclusion in its net income for the year 1920 of the sum of $66,896.03. Thereafter the bureau having been advised that only $44,639.35 had been received from the purchaser, after arbitration of the matter, decided to tax that sum as income instead of the sum of $66,896.03, and accordingly it so computed the tax and granted the claim for refund to the extent of $6,864.86. It denied the claim for refund in the sum of $13,646.91.

To recover that sum this suit is instituted. The Government has filed a counterclaim to recover the sum of $6,864.86 refunded to plaintiff, which represents the tax on the difference between $66,896.03, the tax on net profit as calculated by the bureau, and the $44,639.35, actual payment made to plaintiff in compliance with the agreement of the Sheridan Coal Company to pay plaintiff a sum equal to the tax paid to the Government.

Opinion of the Court

The first question to be decided is: Was any of the tax on the net profit due and payable in the year 1920? The books of plaintiff were kept on an accrual basis. All the events occurred which fixed the amount of the tax and determined the liability of the taxpayer to pay it in advance of the assessment of the tax. The liability of the plaintiff accrued in 1920. *United States* v. *Anderson*, 269 U. S. 422; *Rouss* v. *Bowers*, 30 Fed. (2d) 628; *American National Co., Rec.*, v. *United States*, 274 U. S. 99.

The next question to be decided is: Was the amount to be paid seller by the purchaser in liquidation of the taxes assessed against the seller part of the consideration of the purchase price and to be treated as income? Since this suit was commenced the Supreme Court has handed down the decision in the case of *Old Colony Trust Company* v. *Commissioner of Internal Revenue*, 279 U. S. 716. In this case, *supra*, the Supreme Court held that the payment by the employer of the income taxes assessable against the employeé constituted additional taxable income to such employee. See also *United States* v. *Boston & Maine R. R. Co.*, 279 U. S. 732.

The agreement to pay, and the actual payment by the purchaser of the income taxes assessable against the seller, constitute additional taxable income to such seller. It is a profit derived from the sale, and taxable like any other gain or profit. The total amount paid is the actual purchase price and the adding of the tax was only a method of arriving at the amount to secure the property and formed part of the consideration. *Lash's Products Co.* v. *United States*, 278 U. S. 175.

The plaintiff did not include in its income-tax return for 1920 any amount to cover the Federal taxes for that year which the purchaser had agreed to pay. The Government in adjusting the taxes of plaintiff found the sum of $66,-896.03 and included that amount in the taxable income assessed against the plaintiff and levied an additional tax, which the plaintiff paid. Since the books of the plaintiff were kept on an accrual basis, it might be said this amount accrued to plaintiff. Subsequently, however, after arbitration, the plaintiff only received from the purchaser the sum

of $44,639.35 as the amount of the obligation of the purchaser to discharge the income-tax liability of the seller. Although it might be argued the amount accrued at the time of sale is the correct amount on which the tax should be levied, nevertheless the plaintiff, as a matter of fact, did not receive this amount, but, instead, only $44,639.35. Accruals of this nature for the purpose of determining income for tax purposes are subject to adjustment in order to reflect actual income. *Producers Fuel Co.*, 1 B. T. A. 202; *Josiah Wedgwood & Sons, Ltd.*, 3 B. T. A. 355; *Bonnie Bros., Inc.*, 15 B. T. A. 1231; *Inland Products Co.*, 10 B. T. A. 235, affirmed 31 Fed. (2d) 867; *Philip C. Brown, et al.*, 10 B. T. A. 1122; *Lehigh Valley Coal Sales Co.*, 15 B. T. A. 1401.

We now have before us the matter of the tax liability of plaintiff for the year in which the transaction occurred after all the facts are known and the amounts have been definitely determined.

The plaintiff's income with respect to this item should be determined upon the basis of what actually happened, and, therefore, upon the basis of what it actually received. The Commissioner of Internal Revenue was correct when he adjusted the tax to reflect the actual amount received by the plaintiff from the purchaser as the tax liability under the agreement of the purchaser to pay the tax.

The complaint and counterclaim should be dismissed, and it is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

IRVING BANK-COLUMBIA TRUST CO., EXECUTOR OF WILL OF ARTEMUS WARD, DECEASED, v. THE UNITED STATES

[No. H-495. Decided November 3. 1930]

On the Proofs

Income tax; interest on credits; credit of overpayments for prior years against 1919 tax; interest beyond due date.—Where overpayments of income tax for prior years are credited under sec-

Reporter's Statement of the Case

tion 1324 of the revenue act of 1921 against unpaid original taxes for 1919, duly assessed, interest to the taxpayer is not payable beyond the due date of the 1919 tax, because after such due date the Government is entitled to interest on the unpaid tax, and one interest would offset the other.

The Reporter's statement of the case:

Mr. Laurence Graves for the plaintiff. *Mr. Ellwood W. Kemp, jr.*, was on the brief.

Mr. Charles R. Pollard, with whom was *Mr. Charles F. Kincheloe*, for the defendant. *Mr. J. S. Franklin* was on the brief.

The court made special findings of fact, as follows:

I. Artemus Ward, a resident of New York, died testate March 14, 1925. The Irving Bank-Columbia Trust Company, a New York corporation, was appointed executor of the decedent's estate on April 4, 1925, and is still the sole executor thereof.

II. February 29, 1916, decedent filed his income tax return for 1915 showing a tax of $4,990.44, which was paid June 30, 1916. March 1, 1917, he filed a return for 1916 showing a tax of $15,373.41, which was paid May 23, 1917. May 1, 1918, he filed a return for 1917 showing an income and profits tax of $366,616.80, which was paid June 25, 1918. After a preliminary examination and an audit of the returns for 1915 and 1916, the Commissioner of Internal Revenue on June 28, 1918, notified the decedent that he had determined deficiencies of $11,518.05 for 1915 and $16,891.89 for 1916. The commissioner made an additional assessment of these deficiencies on October 16, 1918, and the amounts were paid to the collector by the decedent after notice and demand. After a similar examination and audit of the returns for 1917, the commissioner on August 18, 1919, notified decedent that he had determined an additional tax of $65,782.66. The commissioner made an additional assessment of this deficiency on October 30, 1919, and the decedent paid the amount of the additional assessment February 6, 1920, after notice and demand by the collector.

III. April 1, 1919, decedent filed a tentative return for 1918 showing an estimated tax of $120,000, which was paid

on that date. June 19, 1919, he filed a completed return for 1918 showing a correct tax liability of $514,529.85. Inasmuch as $120,000 had been paid on April 1, 1919, the balance of $394,529.85 was paid in three installments of $137,264.92 on June 19, 1919, $128,632.47 on September 15, 1919, and $128,632.46 on December 15, 1919.

IV. March 15, 1920, decedent filed an unsigned income tax return for 1919 which was accepted by both the collector and the commissioner as an original return and from which it appeared that the tax due thereon was $399,670, which amount was duly assessed. The first installment of $99,-917.50 of the tax for 1919 as shown on said return was paid March 18, 1920.

V. June 10, 1920, decedent filed amended returns for 1915 and 1916 showing a tax liability for those years of $5,035.85 and $11,101.64, respectively. No assessment was made on these returns, inasmuch as the amounts shown thereon were less than the amounts theretofore assessed and paid on the original returns filed for said years.

VI. June 15, 1920, decedent filed an amended income and profits tax return for 1917 and amended income tax returns for 1918 and 1919 showing a total tax for those years of $282,797.09, $491,720.56, and $204,769.90, respectively. No assessment was made of the tax shown on the amended returns for 1917 and 1918, nor were any payments made thereon, inasmuch as the amounts shown thereon were less than the amounts theretofore assessed and paid on the original returns. The tax shown on the amended return for 1919 was not assessed inasmuch as the amount thereof was less than the tax assessed on the original return for that year.

VII. June 15, 1920, decedent filed a claim asking that the amount of $104,852.40, representing a portion of the tax claimed to have been overpaid for the years 1914 to 1918, inclusive, be credited against the unpaid installments of the tax for 1919, and asking that $105,791.18 of the alleged overpayments for the years mentioned be refunded.

VIII. June 24, 1920, decedent filed a claim for abatement of $194,900.10 of the tax reported and assessed on the return

for 1919 claimed by him to have been assessed in error for that year.

IX. After a further examination and audit of the returns for the years 1915 to 1918, inclusive, the commissioner on October 14, 1920, notified decedent that he had determined overassessments for the years 1915 to 1918, inclusive, in the amounts of $10,730.44, $19,829.86, $107,292, and $11,527.95, respectively.

Based upon additional information submitted subsequent to this determination and in conferences held in the Income Tax Unit of the Bureau of Internal Revenue with decedent's representative, the overassessment for 1917 was adjusted from $107,292 to $131,004.55; the total of the overassessments thus determined being $173,092.80.

X. July 14, 1921, decedent filed a second amended return for 1919 showing a total tax due for that year of $390,-899.23. Inasmuch as he had filed his first amended return on June 14, 1920, showing a tax liability of $204,769.90, and on June 24, 1920, had filed a claim for the abatement of $194,900.10, this second amended return showed an underpayment of tax for said year 1919 of $186,129.33, which was supported by a claim asking that $112,220.37, alleged overpayments for 1914 to 1918, be credited against the underpayment of tax for 1919, leaving a balance of $73,908.96 which was not paid at the time of filing the amended return and no assessment was made on the amended return for 1919.

XI. March 10, 1923, the Acting Commissioner of Internal Revenue approved a schedule designated Schedule IT : A–5072, Form 7777. This schedule embraced overassessments in favor of the decedent of $10,730.44 for 1915, $19,829.86 for 1916, $131,004.55 for 1917, and $11,527.95 for 1918. The schedule was transmitted to the collector at New York for his action in accordance with directions appearing thereon. The collector complied, and on June 6, 1923, returned this schedule properly signed and certified, together with schedule of refunds and credits, IT : R : 5072, Form 7805–A. The overassessments for 1915 to 1918, inclusive, were found to be overpayments and the schedule of refunds and credits, Form 7805, prepared and certified by the collector, was

signed and approved by J. G. Bright, Deputy Commissioner of Internal Revenue, December 18, 1923. The overpayments for the years mentioned were credited against the original tax assessed and due for 1919, as follows:

Year	Overpayment	Year to which credited	Year and account	Due date of 1919 tax against which credited
1915	$10,730.44	1919	Annual 1920 #326445	12/15/20
1916	19,829.86	1919	"	"
1917	131,004.55	1919	"	"
1918	11,527.95	1919	"	"
	173,092.80			

XII. The commissioner allowed and paid interest, as follows:

Year	Overpayment	Amount on which interest allowed	Interest allowed		Amount of interest
			From—	To—	
1915	$10,730.44	$10,730.44	10/16/18	12/15/20	$1,392.46
1916	19,829.86	16,891.89	10/16/18	12/15/20	2,192.01
1917	131,004.55	65,782.66	2/6/20	12/15/20	3,386.45
1918	11,527.95				

No interest has been allowed or paid on the overassessments of the original tax for 1916, 1917, and 1918.

No interest has been assessed or paid on the additional assessments of tax for the years 1915, 1916, and 1917, hereinbefore referred to, neither was there any statutory authority for the assessment and collection of interest on said additional assessments.

The court decided that plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff seeks to recover additional interest of $26,653.21 on overpayments totaling $173,092.80 for the years 1915 to

1918, inclusive, credited against original tax for 1919 as shown in Finding XI.

The credits were allowed and made under section 1324 of the revenue act of 1921. The Commissioner of Internal Revenue allowed and paid interest as shown in Finding XII. He computed and allowed interest to the due date of the unpaid original tax for 1919 (December 15, 1920) instead of to the date of the allowance of the claim for credit on the ground that after that date plaintiff was liable for interest on the 1919 tax.

Plaintiff claims that as to the amounts credited arising from overpayments of the original tax, interest should have been paid from the dates of payments to the date of allowance of the claim for credit, and, as to the amounts credited arising from overpayments of additional assessments, interest should have been allowed from six months after the claim for credit was filed to the date of the allowance of such claim.

The character of the overassessments and the amounts of overpayments credited were as follows:

Year	Overpayment	Amount
1915	$10,730.44	[1] $10,730.44
1916	19,829.86	[1] 16,891.89 [2] 2,937.97
1917	131,004.55	[1] 65,782.66 [2] 65,221.89
1918	11,527.95	[2] 11,527.95

[1] Additional assessment. [2] Original assessment.

Interest was allowed and paid as follows:

Year	Overpayment	Amount on which interest allowed	Interest from—	Allowed to—	Amount
1915	$10,730.44	$10,730.44	Oct. 16, 1918	Dec. 15, 1920	$1,392.46
1916	19,829.86	16,891.89	do	do	2,192.01
1917	131,004.55	65,782.66	Feb. 6, 1920	do	3,386.45
	161,564.85	93,404.99			6,970.92

Opinion of the Court

Interest was disallowed as follows:

Year	Overpayment	Amount on which interest was disallowed
1916	$19, 829. 86	$2, 937. 97
1917	131, 004. 55	65, 221. 89
1918	11, 527. 95	11, 527. 95
	162, 362. 36	79, 687. 71

The plaintiff did not pay all of the original tax shown due and assessed on the returns for 1919, and claims for credit and abatement were filed. Under section 250 (e) of the revenue act of 1918 and section 250 (e) and (h) of the revenue act of 1921 plaintiff became liable for interest upon the unpaid 1919 tax. *Andrews Steel Company* v. *United States*, 42 Fed. (2d) 573. [*Ante*, p. 235.] Plaintiff filed a claim for abatement for an amount of the 1919 original tax in excess of the amount of the overpayments for prior years credited against the 1919 tax, and also filed a claim for credit. It is immaterial whether the commissioner computed interest to the date of the allowance of the claim for credit, since, if he had, plaintiff would have been required to pay the same rate of interest upon the amount of the unpaid 1919 original tax, and such interest from the due date of such tax to the date of the credit would have exceeded the additional interest claimed by plaintiff by $6,850.07.

No interest was payable upon the amounts set forth in the last column of the last tabulation above for the reason that they were additional assessments and the *due* date (December 15, 1920) of the installment of the 1919 tax against which they were credited came within the six-months period following the filing of the claim for credit on June 15, 1920. No interest was paid by plaintiff to the defendant on $173,-092.80 of the original 1919 tax returned and assessed, and later satisfied by a credit of the overpayments for the years 1915 to 1918, inclusive, upon the allowance of the claim for credit from the due dates of the installments of the 1919 tax to the date of the allowance of the claim for credit.

Interest was allowed on the full amount of the overassessment for 1915 from the date the additional assessment was

paid, October 16, 1918, to the due date of the last installment of the unpaid 1919 tax, December 15, 1920, against which it was applied. On the amount of $16,891.89 of the 1916 overassessment, which was an additional assessment, interest was allowed from the date of the payment of the additional assessment, October 16, 1918, to December 15, 1920, the due date of the last installment of the 1919 tax against which it was credited; no interest was allowable on the credit of the remainder of the 1916 overassessment of $2,937.97 for the reason that this amount grew out of the overpayment of the original tax, which was not paid under protest, and claim for credit was filed June 15, 1920, and six months from that date was the due date of the 1919 tax. Interest was allowed on $65,782.66 of the overassessment for 1917 from February 8, 1920, the date of the payment of the additional assessment, to December 15, 1920, the due date of the unpaid installment of the 1919 tax against which it was credited, but no interest was allowable on the remaining $65,221.89 of the overpayment because the due date of the 1919 tax against which it was credited came within the six-months period after the filing of the claim for credit.

No interest was allowable on the credit growing out of the 1918 overpayment for the reason that the due date of the 1919 tax against which it was credited also came within the six-months period following the filing of the claim for credit on June 24, 1920. It therefore appears that all the interest to which the plaintiff is entitled has been allowed and paid before the filing of the petition in this case, and it follows that no recovery can be had.

The petition must therefore be dismissed, and it is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear this case and took no part in the decision thereof.

J. EDWARD MAYMAN AND R. A. MAYMAN, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF LINCOLN INSTITUTE FOR VOCATIONAL EDUCATION, v. THE UNITED STATES

[No. J-92. Decided November 3, 1930]

On the Proofs

Contract for vocational education, Veterans' Bureau; breach; damages.—Upon special findings of fact showing breach by the Government of a contract for education of trainees, Veterans' Bureau, the contractors *held* entitled to (1) loss on depreciated value of machinery and equipment, (2) unpaid tuition and supplies, (3) loss of profits contractors would have derived from full performance.

The Reporter's statement of the case:

Mr. Frederick Schwertner for the plaintiffs. *Messrs. Monte Appel* and *Nathan G. Goldberger* were on the briefs.

Mr. Heber H. Rice, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintffs, J. Edward Mayman and R. A. Mayman, his wife, were copartners doing business in the city and State of New York under the firm name and style of the Lincoln Institute for Vocational Education.

II. On or about July 1, 1921, the plaintiffs entered into a contract in writing with the defendant, through its duly authorized agent, O. W. Clark, assistant director of vocational rehabilitation, which contract was duly approved by the Federal Board of Vocational Education, and in which the plaintiffs agreed for the year beginning on July 1, 1921, and ending June 30, 1922, to accept for instruction, up to the limit of its capacity, in courses approved by the bureau, such persons discharged from the military and naval service entitled to training under the vocational rehabilitation act as may be designated by the bureau during the aforesaid period, and the Government agreed to pay $10,000.00 per month for 287 trainees or less under Group A, which group

comprised vocational instruction and related work, and in addition the sum of $35.00 per month for each trainee in such group in excess of 287; and also to pay $18.00 per month for each trainee in Group B, which group comprised the academic and commercial courses. The first group operated on a 35-hour-per-week schedule and the second group on a 30-hour-per-week schedule. The defendant was to pay $3.00 per trainee for necessary books, supplies, and tools. Certain equipment was furnished by the defendant and the plaintiffs were required to supply other equipment as needed and to maintain the Government's equipment in good order. When the physical condition, conduct, or inaptitude of any trainee necessitated his withdrawal prior to the completion of the course, or training was discontinued for any reason, only the period of his actual attendance was to be charged. Provision was made for inspection of the shops and courses by properly qualified representatives of the board. The plaintiffs were required to furnish suitable quarters for the board's coordinators, medical officers, and clerks.

III. The Lincoln Institute for Vocational Education occupied two floors of the leased loft building situated at 694 Broadway in the city of New York, and covered 31,000 square feet of space which was divided into separate shops, classrooms, office space, social rooms, etc. J. Edward Mayman was in active charge. He was experienced in the work, having been connected for many years as a teacher in the vocational branch of the public-school system of the State of New York. He selected able and experienced assistants, teachers, and coordinators, many of whom were given leaves of absence from the vocational branch of the public-school system of the city of New York, and higher salaries were paid them than they were receiving in the public-school system, and others were carefully selected from the trades and unions.

IV. The trainees were assigned to the school by the defendant acting through the second district of the United States Veterans' Bureau, which comprised the States of Connecticut, New York, and New Jersey, and over which there was a manager in charge. No students could attend the school but those assigned to it by the district branch. When

the assignment was made, the course the trainee was to take was designated to the institute by the branch office. Four coordinators or representatives of the Government were stationed at the institute for the purpose of reporting the progress of the students and recommending changes in the courses. These representatives were fully acquainted with the policy, conduct, and management of the school. Inspections were also made by other representatives of the branch office, and also by the Assistant Director of the Veterans' Bureau and the personal representative of the director. The school could not remove or discharge a trainee and could only recommend a change in trade or study after the trainee had been assigned to a certain trade or study.

V. When the institute opened on July 19, 1921, 638 students were entered during that month. This number was gradually increased during the following months until October, 1921, when the peak of 728 was reached. After this the number gradually decreased each month until March, 1922, when there were 675 trainees in attendance.

VI. Commencing in July and ending in the latter part of September the personal representative of the Veterans' Bureau made several visits to the institute and reported it was overcrowded, but made no recommendation for the relief of the overcrowded condition. He recommended from 50 to 75 students were not mentally capable of receiving education and should be removed. No action was taken on this recommendation. In January the Assistant Director of the Veterans' Bureau visited the institution and reported its overcrowded condition, but no action was taken on this report by the director.

There is no report of any officer of the Veterans' Bureau or its Branch District No. 2 recommending any change in the conduct of the institution or complaining of its teaching force. No officer recommended its discontinuance.

VII. On March 13, 1922, Col. Charles R. Forbes, Director of the United States Veterans' Bureau, accompanied by the assistant director and between 30 and 40 agents appeared at the institute, made a cursory inspection, and then handed the plaintiff, J. E. Mayman, the following letter:

Reporter's Statement of the Case

UNITED STATES VETERANS' BUREAU,
New York, N. Y., March 13, 1922.

J. EDWARD MAYMAN, Esq.,
Lincoln Institute for Vocational Education,
694 Broadway, New York City.

SIR: This will serve to notify you that because of the unsatisfactory service rendered I have ordered all trainees of the U. S. Veterans' Bureau removed from your institute immediately. They will be so removed to-day.

Your attention is called to that part of the agreement between you and the Government which provides that all equipment is loaned and installed by the United States, shall remain the property of the United States, and may be withdrawn by it at any time. You will receive due notice shortly as to the disposition of this property. In the meantime you are reminded that it is the property of the United States subject only to movement by duly authorized Government officials.

Yours very truly,
(Signed) C. R. FORBES, *Director.*

The trainees were marched out under the force accompanying the director, and the equipment owned by the Government was removed. No previous notice of any intention to close the institute was given to plaintiffs.

VIII. The machinery and equipment owned by the plaintiffs and used in the conduct of the school cost $43,084.63, and owing to the damage occasioned by the agents of the Government in removing the Government machinery and the necessity of putting it on a forced sale, only $1,500 was received for all of it. The machinery had been in use two years, and deducting the customary depreciation of 10 per cent per year on material of this class, the value at the time of the sale was $34,467.87, making a net loss of $32,967.87 on machinery and equipment.

IX. The plaintiffs received payment for tuition and supplies to March 13, 1922. This payment did not include the days of the 12th and 13th of March for the trainees in Group A in excess of the 287. The plaintiffs filed a claim with the Veterans' Bureau for the amount covering these two days and this claim was referred to the Comptroller General of the United States, who rejected the claim on October 12, 1923. The amount deducted for tuition fees was $255.38, and the amount of supplies was $21.09.

X. If the contract had not been breached, and the plaintiffs had been permitted to fully perform the same, under the terms and conditions therein, plaintiffs would have made a profit of $27,786.28.

The court decided that plaintiffs were entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiffs sue to recover damages accruing to them, from the alleged breaching, without fault on their part, of a contract made and entered into July 1, 1921, by and between the plaintiffs and the defendant, under the terms of which the plaintiffs agreed to accept for instruction for the period from July 1, 1921, to July 1, 1922, up to the limit of the capacity of the Lincoln Institute for Vocational Education, in courses approved by the bureau, such persons discharged from the military and naval service entitled to training under the vocational rehabilitation act, as might be designated by the bureau during the aforesaid period, and for which services the plaintiffs were to receive stated sums set out in the contract.

Upon the facts, as they have been determined by the court in the foregoing special findings, the plaintiffs are entitled to recover. The contract in question is valid, having been executed on behalf of the defendant through a duly authorized agent of the Federal Board for Vocational Education, and duly approved by the said board. The contract was, without fault on the part of plaintiffs, breached by the defendant, whereby its complete performance by the plaintiffs was prevented, although the plaintiffs were ready, willing, and able to perform.

The plaintiffs are entitled to recover the losses which they sustained and the profits which they would have realized had they been permitted to complete the performance of the contract. *Behan* v. *United States*, 18 C. Cls. 687; *United States* v. *Behan*, 110 U. S. 338.

In *Behan* v. *United States*, *supra*, this court in discussing damages which the plaintiffs may recover where a contract is breached by a defendant preventing its performance said:

Syllabus

"Whatever rule may be adopted in calculating the damages to a contractor when, without his fault, the other party, during its progress, puts an end to the contract before completion, the object is to indemnify him for his losses sustained and his gains prevented by the action of the party in fault, viewing these elements with relation to each other."

The Supreme Court in affirming the decision of this court (*United States* v. *Behan*, *supra*), said:

"If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: First, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract."

The plaintiffs' losses by reason of the breaching of the contract have been definitely established. Such losses as shown by the findings are:

1. Loss on depreciated value of machinery and equipment (Finding VIII)	$32,967.87
2. For tuition and supplies for March 12 and 13, 1922 (Finding IX)	276.47
3. Loss of profits the plaintiffs would have derived from full performance of contract (Finding X)	27,786.28

The plaintiffs are, therefore, entitled to recover the sum of $61,030.62, and judgment for that amount is hereby awarded. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, took no part in the decision of this case.

ATLANTIC REFINING CO. v. THE UNITED STATES

[No. H-520. Decided November 3, 1930]

On the Proofs

Income and profits tax; credits; offset of interest against interest.—Plaintiff made an income and profits tax return for 1920 and the tax shown therein was assessed. Upon the several dates when the first and second installments were due it filed claims asking that there be credited against them certain alleged over-

payments for 1917. On or about June 23, 1923, the Commissioner of Internal Revenue determined an overassessment for 1917, credited the same October 30, 1923, against the unpaid installment of the original tax for 1920 due December 15, 1921, and on July 15, 1924, paid plaintiff interest on the credit from the date of overpayment to the due date of the last installment of the original tax for 1920, viz. December 15, 1921. *Held*, that under section 250 (e) of the revenue acts of 1918 and 1921, the plaintiff was liable for interest on the original tax returned and assessed for 1920 against which claims for credit were filed, and this liability for the period subsequent to December 15, 1921, offset the Government's liability under section 1324 of the revenue act of 1921.

Same; Treasury regulations; claim for credit; claim for abatement; overdue taxes.—The effect of article 1035, Treasury Regulations 62, was to relieve the taxpayer from the necessity of immediate payment of tax against which credit was asked until the claim was decided, but the regulation put the taxpayer upon notice that in such a case he would not be relieved from the payment of interest at the rate of ½ of one per cent a month (sec. 250 (e), revenue acts of 1918 and 1921), which was a lower rate of interest than that provided in the statute for failure to pay a tax when due and was the rate of interest provided by the statute when a bona fide claim for abatement was filed. This regulation was a reasonable one.

Same; collector of internal revenue; notice; presumption as to performance of duty.—In the absence of proof it will be presumed that where the collector of internal revenue was in duty bound to give statutory notice of taxes due, such duty was performed.

The Reporter's statement of the case:

Mr. A. S. Lisenby for the plaintiff. *Weill, Wolff, Satterlee & Blakely* were on the briefs.

Mr. Charles R. Pollard, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant. *Mr. D. Louis Bergeron* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff is a Pennsylvania corporation with principal office and place of business at Philadelphia. For the calendar year 1917 it was affiliated within the meaning of section 1331 (b) of the revenue act of 1921, declaratory of the provisions of Title II of the revenue act of 1917, with the Atlantic Oil Producing Company and the Atlantic Oil Ship-

ping Company, Delaware corporations, with principal offices and place of business at Philadelphia.

II. April 1, 1918, plaintiff filed separate income and profits tax returns for the calendar year 1917 showing a tax of $3,925,136.30, which was paid June 15, 1918. On the same date the Atlantic Oil Producing Company filed its separate income and profits tax returns for the calendar year 1917 showing that it sustained a loss for the taxable year. On the same date the Atlantic Oil Shipping Company filed a separate income and profits tax return for the calendar year 1917 showing a tax of $81,007.23, which was paid June 15, 1918.

III. February 24, 1920, plaintiff filed an amended income-tax return showing a change in its net income for that year from which it appeared that the tax due was $2,471,788.47. On the same date the Atlantic Oil Producing Company filed an income-tax return for 1917 showing a net loss for that year. On the same date plaintiff prepared and filed a consolidated excess-profits tax return for 1917 showing the profits tax computed on the consolidated net income of it and its subsidiaries, the Atlantic Oil Producing Company and the Atlantic Oil Shipping Company. Subsequently, on February 11, 1921, plaintiff and its affiliated corporations filed a second amended income-tax return and first amended consolidated profits-tax return for 1917, from which it appeared that the tax due was $3,045,438.05. The income and profits tax shown on the amended returns above mentioned was not assessed and no payments were made in respect of the tax shown thereon other than the payments which had already been made.

IV. March 15, 1921, plaintiff filed a claim asking that $583,750 of the income and profits tax paid for 1917 be credited against the first installment of the income and profits tax returned and assessed for the year 1920, which installment was due March 15, 1921. By letter of May 26, 1921, it advised the Commissioner of Internal Revenue of certain changes in the second amended income-tax return and first consolidated profits-tax return for 1917 filed by it and its affiliated corporations February 11, 1921, showing a reduction in tax from $3,045,438.05 to $2,999,096.91.

V. June 15, 1921, plaintiff filed a claim asking that $248,-716.20 of the income and profits tax assessed and paid for 1917 be credited against the second installment of the income and profits tax returned and assessed for 1920 due and payable June 15, 1921. Upon the filing of the claims for credit payment of the installments of the 1920 tax was postponed under Art. 1035, Reg. 62.

VI. February 26, 1923, plaintiff filed with the collector a claim for refund for 1917 of $3,283,529.62.

VII. After an examination and an audit of the returns for the years 1909 to 1917, inclusive, the commissioner, on June 23, 1923, notified plaintiff of his determination of an additional tax of $974.67 for 1909, $3,341.03 for 1910, $4,-917.03 for 1912, $879.16 for 1913, $2,442.60 for 1915, $3,274.99 for 1916, and an overassessment of $632,763.14 for 1917, the total of the deficiencies being $15,829.36. The deficiencies mentioned were assessed by the commissioner June 15, 1923, and upon notice and demand from the collector were paid November 7, 1923.

VIII. July 13, 1923, the commissioner approved a schedule of overassessment, IT: A: 6254, Form 7805, which embraced the overassessment in favor of plaintiff for 1917 above mentioned. This schedule was transmitted to the collector for the first district of Pennsylvania for his action in accordance with the directions appearing thereon. The collector complied, examined the accounts of the taxpayer and made appropriate entries upon the schedule and prepared a schedule of refunds and credits, IT: R: 6254, Form 7805–A, showing the amount of the overassessment to be an overpayment. These schedules were signed and certified by the collector to the commissioner, September 25, 1923. Upon receipt by the commissioner they were checked in the Income Tax Unit of the Bureau of Internal Revenue and the schedule of refunds and credits, Form 7805–A, was approved by J. G. Bright, Deputy Commissioner of Internal Revenue, and by D. H. Blair, Commissioner of Internal Revenue on October 30, 1923.

IX. Subsequently the commissioner issued a certificate of overassessment, #250765, showing an overassessment of $632,763.14 in respect of the tax of the plaintiff for 1917.

X. The overpayment of $632,763.14 was credited against the unpaid installment of the original tax for 1920 due and payable December 15, 1921, leaving a balance due in respect of the original tax for 1920 of $199,703.06, representing the difference between $832,466.20, for which claims for credit of $583,750 and $248,716.20 had been filed, and $632,763.14, the amount credited. This balance of $199,703.06, original tax for 1920, was paid to the collector after notice and demand on February 9, 1924.

XI. The overpayment of $632,763.14 and the interest computed thereon of $9,491.45 were eliminated from the original schedule of refunds and credits, IT : R : 6254, Form 7805-A, approved October 30, 1923, and entered on a supplemental schedule of refunds and credits of the same number and form for direct settlement in accordance with the memorandum from the General Accounting Office dated November 8, 1923.

XII. Plaintiff received no payment on account of interest until July 15, 1924, when it received a notice of settlement of claim from the Comptroller General of the United States with which was inclosed Treasury warrant in favor of plaintiff for $9,491.45.

XIII. The commissioner computed and allowed interest on the overpayment of $632,763.14 for 1917 credited against the unpaid installments of the original tax assessed for 1920 from September 15, 1921, the date of the overpayment, to December 15, 1921, the date on which the last installment of the original tax for 1920 was due.

XIV. On March 29, 1927, plaintiff requested the commissioner to allow and pay additional interest on the overpayment for 1917. April 12, 1927, the commissioner denied this claim for additional interest on the following ground:

"The overassessment in question was credited to outstanding taxes for the year 1920 due December 15, 1921. The revenue act of 1918, under which the taxes for the year 1920 were determined, provided, under certain conditions, for the collection of interest at the rate of 6 per cent per annum on any tax remaining due and unpaid. This office holds, therefore, that any interest allowable on an overassessment credited to such taxes must be computed only to the due date, December 15, 1921, or it must be concluded that such

taxes were not paid when due and the question of the collection of interest considered."

XV. Plaintiff has paid no interest on the underpayment of tax for the years 1909, 1910, 1912, 1913, 1915, and 1916, and no demand has been made for interest thereon.

The court decided that plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The plaintiff is correct in its contention that the credit was allowed on October 30, 1923, *Revolution Cotton Mills* v. *United States*, decided by this court June 16, 1930,[1] but this does not entitle it to recover unless the commissioner was wrong in his decision that plaintiff was liable for interest on the unpaid original tax for 1920 against which the credit was taken. We think the commissioner correctly held that plaintiff was liable for interest under section 250 (e) of the revenue act of 1918, 40 Stat. 1082, and section 250 (e) of the revenue act of 1921, 42 Stat. 266, on the original tax returned and assessed for 1920 against which claims for credit were filed. Subdivision (a) of section 250 of the 1918 act provided for the payment of the tax in four installments and fixed the date on which each installment was due and should be paid. Subdivision (e) of that section provided, with certain exceptions not material here, that "If any tax remains unpaid after the date when it is due, and for ten days after notice and demand by the collector, * * * there shall be added as part of the tax the sum of 5 per centum on the amount due but unpaid, plus interest at the rate of 1 per centum per month upon such amount from the time it became due:" and further provided that "as to any such amount which is the subject of a *bona fide* claim for abatement the 5 per centum shall not be added and the interest from the time the amount was due until the claim is decided shall be at the rate of ½ of 1 per centum per month; that in the case of the first installment provided in subdivision (a) of this section the instructions printed on the return shall be sufficient notice of the date when the tax is due and sufficient demand." Subdivision (e) of section 250 of the 1921 act contained similar provisions, and the further provi-

[1] To be reported hereafter.

Opinion of the Court

sion that "In the case of each subsequent installment the collector may, within thirty days and not later than ten days before the installment becomes due, mail to the taxpayer notice of the amount of the installment and the date on which it is due for payment." Subdivision (h) made the provisions of section 250 (e) of the revenue act of 1921 applicable to taxes assessed under the revenue acts of 1917 and 1918.

We have held in *Andrews Steel Company* v. *United States*, 42 Fed. (2d) 573 [*ante*, p. 235], that where an overpayment for 1917 was credited against the first installment of the tax for 1919, the taxpayer was liable for interest on the installment from the date it became due and the commissioner correctly offset such interest against the interest provided in section 1324 of the revenue act of 1921 upon the amount credited. The reason for so holding was that demand had been made for the tax and it was not paid when it became due. The rule announced in the *Andrews Steel Company case* applies here and prevents the recovery of the additional interest claimed. In this case plaintiff made a return for 1920 and the tax shown thereon was assessed. It claimed an overpayment for 1917 and filed two claims asking that the alleged overpayment for 1917 be credited against the first and second installments of the tax due for 1920. The effect of Art. 1035, Reg. 62, was to relieve the taxpayer from the necessity of immediate payment of tax against which credit was asked until the claim was decided, but the regulation put the taxpayer upon notice that in such a case he would not be relieved from the payment of interest at the rate of ½ of 1 per cent a month, which was a lower rate of interest than that provided in the statute for failure to pay a tax when due and was the rate of interest provided by the statute when a *bona fide* claim for abatement was filed. We think this regulation was a reasonable one. The plaintiff does not attack it.

It does not specifically appear that the collector of internal revenue gave plaintiff notice of the amount of the second and subsequent installments of the 1920 tax and the date on which they were due for payment, but, if such notice were necessary in view of the regulations, Art. 1035, it would be incumbent upon the plaintiff to establish the fact relative

thereto. In the absence of proof, it will be presumed that the collector performed his duty. *Ross and Morrison* v. *Reed*, 1 Wheat. 482; *Rankin* v. *Hoyt*, 4 How. 335; *Gonzales* v. *Ross*, 120 U. S. 605; *Nofire* v. *United States*, 164 U. S. 657; *United States* v. *Royer*, 268 U. S. 398.

We are of opinion that plaintiff was liable for interest upon the 1920 tax against which the credit was taken at the rate of at least ½ of 1 per cent a month, as charged by the defendant. The defendant allowed and paid interest on the credit from a date six months after the filing of the claim to December 15, 1921, the latter date being the date on which the last installment of the 1920 tax became due. It does not specifically appear against which installment or installments, the overpayment was credited but, since the plaintiff was liable for interest on the 1920 tax against this credit, it has no right to complain because the defendant computed and paid interest on the credit to the due date of the last installment for 1920.

The plaintiff does not controvert the proposition that it was liable under the statute for interest on the unpaid tax for 1920. It insists that the positive provisions of section 1324 of the revenue act of 1921 require the Government to pay interest upon a credit to the date of the allowance thereof and contends that it is entitled to recover the additional interest because this was not done. Its position would seem to be that the Government should have paid interest on the credit to the date of allowance, and, if the plaintiff was liable for interest on the 1920 tax, the Government should have required it to pay the same. We think such a procedure was unnecessary, since the interest for which the plaintiff was liable after the due date of the 1920 tax exactly equaled the interest for which the Government was liable on the credit after that date. *Andrews Steel Co.* v. *United States*, *supra*.

The petition must be dismissed, and it is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear this case and took no part in the decision thereof.

TRUSCON STEEL COMPANY v. THE UNITED STATES

[No. D-853. Decided November 3, 1930]

On the Proofs

Contract for terra cotta blocks; price f. o. b. designated point; shipment collect from more distant point.—Where a contract of sale to the Government provided for a price f. o. b. a designated point, and the things sold were forwarded collect from a more distant point, increasing the freight charges, the Government is entitled to recover the difference.

Same; unliquidated counterclaim; interest.—The Government is not entitled to interest on an unliquidated counterclaim before it is adjudicated.

The Reporter's statement of the case:

Mr. Raymond M. Hudson for the plaintiff.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant. *Mr. Charles F. Kincheloe* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation engaged in the business of manufacturing steel sash. In October and November of 1918 the defendant authorized it to manufacture a certain quantity of sash on specified terms and at a specified price for use in the performance of a contract which the defendant had made with other parties. Immediately after being so authorized, plaintiff began the manufacture of the sash, and had made a substantial part thereof and shipped two carloads, when the defendant canceled the authorizations in December of 1918 and January of 1919. In February, 1919, representatives of the Government visited plaintiff's plant with a view to adjusting the Government's obligations to the plaintiff. As a result of these negotiations, the orders for sash previously referred to were reinstated, and plaintiff was directed to deliver all of the material called for thereby that had not been previously delivered. To cover the

expenses incurred by the cancellation of the orders, plaintiff was allowed a total of $600.24. Subsequently, plaintiff delivered all of the sash covered by the orders and received full payment of the same, together with the amounts agreed upon as payment for additional expenses incurred by reason of the cancellations. The amount of damages plaintiff sustained by reason of the cancellation of the orders is not proved by the evidence.

II. Under date of July 1, 1918, the Government sent plaintiff a purchase order for 4,000 terra cotta blocks, concerning which there had been some previous correspondence between the parties.

Paragraph 4 of said purchase order was as follows:

"Upon receipt of properly signed voucher showing delivery and acceptance of the material herein ordered, you will be paid at the rate of $6.50 per ton, f. o. b. cars President St. Station, Penna. R. R., Baltimore, Md."

Under date of July 13, 1918, plaintiff notified the commanding officer, Edgewood Arsenal, that it accepted the purchase order dated July 1, 1918, but shipped the blocks from Oneida, Ohio, directly to Edgewood, Maryland, in the manner which it had done with other material furnished the Government. The freight charges from Oneida, Ohio, to Edgewood, Maryland, on the blocks amounting to $299.37 were paid by the Government. The freight from Baltimore to Edgewood would have amounted to $132.07.

The claims sued on in this action were filed with the Secretary of War prior to June 30, 1919. They were considered by the Board of Contract Adjustment and disallowed.

The court decided that plaintiff was not entitled to recover. Judgment for defendant on counterclaim $167.30.

GREEN, *Judge*, delivered the opinion of the court:

Plaintiff brings this suit to recover damages in the amount of $6,578.89 which it alleges it has sustained by reason of the cancellation by defendant of certain orders which it had given for steel sash.

Counsel for defendant contend that the evidence shows that there was a settlement between plaintiff and defendant of this claim and that plaintiff was paid the full amount agreed upon and accepted it without objection. The evidence does show that defendant agreed to allow plaintiff a certain sum to compensate it, presumably for the damage sustained through the cancellation of the orders, and that this sum was paid. Further the evidence is silent. It is not necessary, however, that we should determine whether or not there was a complete settlement and an accepted payment thereunder. The plaintiff can not in any event be awarded damages, for there is no competent evidence of the amount thereof. The testimony offered by plaintiff is little more than a statement of what plaintiff claimed on the various items of its damage pertaining to the separate orders and is wholly unsatisfactory. The petition of plaintiff must therefore be dismissed.

There is no controversy over the facts relating to defendant's counterclaim. After some correspondence in relation thereto plaintiff accepted an order for the terra cotta blocks which specified that they were to be paid for at a rate of $6.50 per ton f. o. b. cars at Baltimore. After receiving this order plaintiff shipped the blocks to defendant from Oneida, Ohio, by reason of which defendant paid $167.30 more freight than it would had the blocks been shipped from Baltimore. We think a fair construction of this order means that the price to be paid was to be determined on the basis of freight from Baltimore. If we are correct in this, it follows that defendant has overpaid plaintiff in the amount of the difference of the freight charges from Baltimore to Edgewood and Oneida to Edgewood.

The defendant asks judgment for interest on the amount of its recovery from the date when it paid the freight, but this amount was not paid to the plaintiff but to the railroad company. Moreover, the freight and the price of the blocks alone were paid without objection or any claim that the defendant did not owe the amount paid. More than six years afterwards, for the first time so far as anything appears in the evidence, the defendant made demand on the plaintiff through its counterclaim for repayment. Clearly it was not

Reporter's Statement of the Case

entitled to interest prior to the time when the demand was made, and we think not then, for the defendant claimed it was entitled to all of the freight paid from Oneida to Edgewood, and the question of whether it was entitled to recover any of it under the circumstances of the case and the correspondence which passed between the parties might fairly be raised. The defendant's claim, therefore, is an unliquidated one upon which it is not entitled to interest until it is adjudicated to be valid.

In accordance with the above conclusions, judgment will be entered for the defendant in the sum of $167.30.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear this case and took no part in the decision thereof.

COLUMBIA STEEL & SHAFTING CO. v. THE UNITED STATES

[No. J-107. Decided November 3, 1930]

On the Proofs

Profits tax; redetermination under sec. 210, revenue act of 1917; closing agreement; interest.—A closing agreement under section 1312 of the revenue act of 1921, whereby the taxpayer accepts refund of profits tax redetermined under section 210 of the revenue act of 1917, is conclusive upon the taxpayer as to allowance of interest, notwithstanding interest is not specifically mentioned therein.

The Reporter's statement of the case:

Mr. Newell W. Ellison for the plaintiff. *Messrs. Edward B. Burling* and *William Merrick Parker*, and *Covington, Burling & Rublee* were on the briefs.

Mr. Charles R. Pollard, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant. *Mr. D. L. Bergeron* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff, a Pennsylvania corporation with principal office at Pittsburgh, filed its income and profits tax return for 1917 on April 1, 1918, showing a tax of $1,774,-807.18, which was paid June 15, 1918. September 6, 1919, the Commissioner of Internal Revenue made an additional assessment of $95,173.34 for 1917 and on October 25, 1919, plaintiff filed with the collector a claim for the abatement of the entire amount of the additional assessment. August 14, 1920, the commissioner notified plaintiff of his decision allowing the claim for $26,532.12 and rejecting it for $68,-641.22. Plaintiff paid the last-mentioned amount October 6, 1920.

II. August 25, 1919, the plaintiff requested the commissioner to grant it relief by determining its profits tax for 1917 under the provisions of section 210 of the revenue act of 1917.

III. November 25, 1919, plaintiff filed a claim asking that $302,156.38 of the income and profits tax paid for 1917 be credited against the unpaid balance of the income and profits tax for 1918, based on plaintiff's claim that its profits tax for 1917 should be determined under section 210 of the revenue act of 1917 and that such determination would show an overassessment in that amount.

IV. May 24, 1921, plaintiff filed a claim for refund of $279,285.38 requesting that its profits tax for 1917 be determined in accordance with the provisions of section 210, *supra*.

V. The commissioner allowed the application of the plaintiff for determination of its profits tax under the provisions of section 210 and upon a computation of its profits tax under that section, he determined an overassessment of $121,811.02.

VI. August 25, 1922, the commissioner approved the schedule entitled "Schedule of Reduction of Tax Liability" IT:A:2438, Form 7777, embracing an overassessment of $121,811.02 in favor of plaintiff for 1917. This schedule was transmitted to the collector for his action in accordance with the directions appearing thereon. The collector com-

plied and on October 6, 1922, signed and returned this schedule to the commissioner, together with a Schedule of Refunds, IT:R:2438, Form 7777–A. October 21, 1922, the commissioner approved the schedule of refunds authorizing the disbursing clerk of the Treasury Department to issue checks for the amounts found by him to be refundable to the several taxpayers whose names appeared on the schedule. October 27, 1922, the commissioner mailed to plaintiff a certificate of overassessment of $121,811.02 for 1917, together with a Treasury check for that amount.

VII. The commissioner determined that no interest was allowable on the overpayment for 1917 and he also refused, and still refuses, to compute and allow interest on the overpayment above mentioned for that year.

VIII. When the period of limitation has expired within which the commissioner might allow an overassessment without the filing of a claim for refund, it is and has been the uniform practice in the Bureau of Internal Revenue to require the timely filing of a claim as a condition precedent to the allowance of an overassessment. This practice is applicable to claims for refund based on special assessment, as well as to all other claims.

IX. April 19, 1923, plaintiff and the commissioner, with the approval of the Secretary of the Treasury, entered into an agreement under and pursuant to the provisions of section 1312 of the revenue act of 1921, which agreement was as follows:

"THIS AGREEMENT, made this 17th day of April, 1923, under and in pursuance of section 1312 of the revenue act of 1921, by and between Columbia Steel & Shafting Co., a taxpayer having its principal office or place of business at Pittsburgh, Pa. (hereinafter referred to as the 'taxpayer'), and the Commissioner of Internal Revenue (hereinafter referred to as the 'Commissioner'), with the approval of the Secretary of the Treasury:

"WHEREAS, on or about the first day of April, 1918, there was assessed against the taxpayer the sum of $1,843,448.40 as the amount of taxes due the United States of America from the taxpayer on account of 1917 income and excess profits taxes; and

"WHEREAS the taxpayer pursuant to such assessment, on or about the first day of June, 1918, paid the sum of

$1,843,448.40 as taxes due the United States of America on account of said 1917 income and excess profits taxes; and

"WHEREAS there has been a determination by the commissioner that the sum of $1,721,637.38 is the correct amount for which the taxpayer was liable on account of said 1917 income and excess profit taxes; and

"WHEREAS, the commissioner has made a refund, based on such determination and such assessment, of the sum of $121,811.02, and the taxpayer has accepted such refund;

"NOW, THIS AGREEMENT WITNESSETH: That the taxpayer and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, hereby mutually agree that such determination of the sum of $1,721,637.38 as the correct amount of taxes for which the taxpayer was liable on account of said 1917 income and excess profits taxes and such assessment as reduced by the amount refunded as aforesaid, shall be final and conclusive.

"IN TESTIMONY WHEREOF, the parties to these presents have hereunto set their hands and seals the day and year first above written.

"COLUMBIA STEEL AND SHAFTING CO.,
Taxpayer.

"By EDWARD L. PARKER, *Pres.*

[SEAL.] "C. R. NASH,
Acting Commissioner.

"Approved: April 19, 1923.
"A. W. MELLON, *Secretary.*"

X. June 2, 1926, plaintiff requested the commissioner to compute and allow interest on the overpayment for 1917, which request is attached to the petition as Exhibit G and, by reference, is made a part of this finding but need not be set out herein. June 23, 1926, the commissioner notified the plaintiff that interest could not be allowed in view of the agreement hereinbefore set forth.

XI. October 27, 1926, plaintiff filed a claim for interest on the overpayment for 1917 on the ground that the closing agreement had no bearing on the question of interest. On November 11, 1926, the commissioner notified the plaintiff that inasmuch as the case involving the year 1917 had been closed by the agreement no further action could be taken in the matter.

The court decided that plaintiff was not entitled to recover.

Opinion of the Court

LITTLETON, *Judge*, delivered the opinion of the court:

It is argued by plaintiff that this suit is not for the purpose of annuling, modifying, or setting aside the determination or assessment by the commissioner, but is for the recovery of interest on an overpayment as to which no reference is made in the statute or in the closing agreement. Section 1312 of the revenue act of 1921, which is entitled "Final Determinations and Assessments," provides "That if after a determination and assessment in any case * * * an agreement is made in writing * * *, that such determination and assessment shall be final and conclusive * * *, no suit, action, or proceeding to annul, modify, or set aside such determination or assessment shall be entertained by any court * * *." It will thus be seen that no attempt was made to define what should be included within the term "determination," and the term is in no way limited to any particular question or feature of the tax account with reference to the liability of the taxpayer to the Government, or of the Government to the taxpayer, with the decision of which the commissioner is charged. The provision in the section "That if * * * a taxpayer has without protest paid in whole any tax or penalty or has accepted any abatement, credit, or refund based on such determination and assessment, and an agreement is made * * *," is not a limitation upon the "determination," but is a condition prerequisite to the right to enter into the agreement and to its validity. If the taxpayer or the Government is not willing to make the determination that has been made final and conclusive, neither is required to make the agreement, but once it is made, neither the taxpayer nor the Government can raise any further question or make any further claim with reference to any feature of the tax account for the particular taxable year involved.

We are of opinion, therefore, that under the closing agreement and section 1312 of the revenue act of 1921 the plaintiff can not recover and that the court is without authority to annul, modify, or set aside the agreement. *Parish & Bingham Corp. et al.* v. *United States*,[1] No. J-445, and

[1] To be reported in next volume.

Wilton Lloyd-Smith, Receiver, v. *United States*,[1] No. J-390, this date decided.

The petition must therefore be dismissed, and it is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear this case and took no part in the decision thereof.

INGENIO PORVENIR C. POR A. v. THE UNITED STATES
CENTRAL ROMANA v. SAME

[Nos. F-134 and F-135. Decided November 3, 1930]

On the Proofs

Jurisdiction; actions arising out of occupancy of foreign territory.—The Court of Claims is without jurisdiction to entertain a suit arising out of action taken by the President in foreign territory occupied by the military forces of the United States and governed by him.

The Reporter's statement of the case:

Mr. Chester A. Gwinn for the several plaintiffs. *Humphreys & Day* were on the briefs.

Mr. Assistant Attorney General Charles B. Rugg for the defendant. *Mr. J. Robert Anderson* and *Madam Loyola M. Coyne* were on the briefs.

The court made special findings of fact, as follows:

The Central Romana, Inc., a plaintiff named above, is a corporation organized under the laws of the State of Connecticut having an office in the Republic of Santo Domingo, and during the period involved in this case doing business therein. The Ingenio Porvenir C. Por A., the other plaintiff, is a corporation which, during the same period, was doing business in the Republic of Santo Domingo. At all

[1] To be reported in next volume.

times hereinafter mentioned the armed forces of the United States, acting as a military government, had complete and absolute control of the affairs of the said Republic of Santo Domingo and its government. This military government of the Dominican Republic was established by proclamation issued by the President of the United States on November 29, 1916. In the course of the operations of the said military government, an Executive order was issued appointing a food controller with authority to regulate and control the sale and distribution of foodstuffs. On May 19, 1920, the food controller, with the approval of the military governor of Santo Domingo, issued Food Control Order No. 10, stating among other things that 640,000 pounds of grade 1–A granulated sugar and 768,000 pounds of grade 3–C granulated sugar belonging to the plaintiff, the Central Romana, Inc., and 688,000 pounds of grade 96 test sugar belonging to the plaintiff, Ingenio Porvenir C. Por A., together with sufficient storage space in the warehouses of plaintiffs for the storage of said sugar, were requisitioned; and the plaintiffs were required to withhold said sugar from sale and hold it subject to the orders of the food controller, the distribution and sale thereof to be conducted by agents of the military government.

It was further provided by the said Food Control Order No. 10 that—

"In case the Government through the food controller releases any of the sugar hereby requisitioned, commandeered, and seized, it guarantees to the company any difference that may exist on day of release between the New York market price for 96 test sugar (plus two cents for 3–C granulated sugar and plus three cents for 1–A granulated sugar), less the sum of one cent per pound and the price of 17½ cents per pound for 96 test sugar; 19½ cents per pound for 3–C granulated sugar; and 20½ cents per pound for 1–A granulated sugar."

In accordance with the terms of the said order, the plaintiff, the Central Romana, Inc., held for and subject to the orders of the military government 640,000 pounds of grade 1–A granulated sugar and 768,000 pounds of grade 3–C granulated sugar until January 24, 1921, when the military government released said sugar to the said plaintiff for such use as it might see fit.

The plaintiff, Ingenio Porvenir C. Por A., held the said 688,000 pounds of grade 96 test sugar in accordance with said order until March 28, 1921, when the military government released it to the said plaintiff for such use as it might see fit. Food Control Order No. 10 by its terms extended to September 1, 1920, but by subsequent orders issued by the said food controller the time for holding the aforesaid sugar was continued to and including March 28, 1921.

Before the sugar was released it had declined greatly in value. The military government of Santo Domingo would not consent to the release of the sugar aforesaid until the respective plaintiffs executed to the "Government of the Dominican Republic" a release of all claims of every nature and description arising out of the said food-control orders. Before the releases were executed negotiations were had between the respective plaintiffs and officials representing the military government, in which the latter caused the plaintiffs to understand that if the releases were not signed an export tax would be levied on the sugar, which would be likely to continue in force and cost plaintiffs in the future more than the loss on the sugar. Influenced thereby, the plaintiffs, respectively, executed the releases. There is no direct evidence as to the value of the sugar in New York at the time when the releases were executed, but the releases contained a provision in the case of the Central Romana, Inc., that should the Government of the Dominican Republic levy any extraordinary tax to pay the obligations incurred by Food Control Order No. 10 said Government bound itself to issue to the Central Romana, Inc., certificates in the amount of $200,640; and in the case of Ingenio Porvenir C. Por A. a similar provision for the issuance of certificates to the amount of $92,880.

The court decided that the several plaintiffs were not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

These two cases by agreement are submitted together upon one statement of facts. The cases are based upon the action of the Navy Department in the military occupa-

tion of Santo Domingo, acting under authority of a proclamation of the President of the United States. The material facts may be summarized as follows:

In 1916, the President authorized the naval forces of the United States to occupy Santo Domingo and take over its government. During the period of this military occupancy and government, an official of such government called the "food controller" issued what was known as Food Control Order No. 10. This order advised the respective plaintiffs that certain quantities of sugar then owned by each of them were requisitioned, and they were directed to hold the same, which they accordingly did, until this requisition was released. During the period while the sugar was so held, it greatly declined in value, but plaintiffs were unable to get the sugar discharged from the requisition until they had respectively executed a release of all claims of every kind and description arising out of the said food control order. The evidence leaves no question but that the officials of the military government caused them to understand that if they did not sign the releases of their claims a tax would be levied which would in the end cost more than the loss on the sugar.

The releases, which were also signed by the food controller and a naval officer, in each case stated that the Government guaranteed to the respective plaintiffs any difference that might exist on the day of release between the New York price for the sugar and a price specified in the release, which appears to have been what the parties considered to be a fair price for the sugar at that time.

There is no direct evidence as to the price of sugar in New York at the time the sugar was released, but in the releases there was a provision for issuing certificates to the plaintiff, Central Romana, Inc., in the sum of $200,640, and to the plaintiff, Ingenio Porvenir C. Por A., in the sum of $92,880, in case of a tax being afterwards levied to pay the obligations incurred by virtue of Food Control Order No. 10.

The claim of the plaintiffs in substance is that Food Control Order No. 10 constituted an agreement binding on the defendant to pay the difference between the price named in

the release and the market price on the date of the release of the sugar, or, if it can not be so construed, that the plaintiffs' property was taken over by defendant and they are entitled to just compensation therefor. Upon either theory, plaintiffs contend that they are entitled to judgment for the amount of the difference between the market price and the agreed price stated in the release.

There are several reasons why plaintiffs can not recover here, but we need state only one, as it takes away the entire foundation of their claims. It will be observed that the cases are based on the action of the military forces of the United States acting under the direction of the President. We do not need to enter into a consideration of the reasons which actuated the President in issuing the proclamation under which the territory of a foreign nation was occupied and its government taken over by the military authorities, nor is there any need that we should consider the circumstances attending such occupation, or the manner in which the military government was carried on. In a general way, the act of taking over the Government of Santo Domingo and all the proceedings thereunder were political matters as to which we have no jurisdiction. Under the Constitution the President is the Commander-in-Chief of the Army and Navy, and this court has no jurisdiction to review his acts in exercising the power so granted in a foreign country and base a judgment thereon. The acts which are claimed to fix a liability on the defendant were done under the orders of the President and occurred in a foreign country. The policy which he adopted and the acts done pursuant thereto were matters of state and wholly within his discretion. Consequently, they did not give rise to any contract, express or implied, upon which either plaintiff could bring a suit in this court. There does not seem to be any case in which the precise question here involved has been considered by the Supreme Court, but the principles which control it are settled by a long line of decisions, which hold that such cases as we now have before us present political questions exclusively within the jurisdiction of the Executive Department of the Government. It is not necessary that we should cite the many cases that in principle support this rule, but we

would call attention to *Marbury* v. *Madison*, 1 Cranch 137; *Perrin* v. *United States*, 12 Wall. 315; *Kendall* v. *United States*, 12 Peters 524; and *Martin Luther* v. *Luther M. Borden*, 7 How. 1.

It follows that under the circumstances appearing in the case we can not review the action of the Chief Executive in exercising his constitutional right in order to fix a liability upon the Government.

We can very well understand why the plaintiffs consider they have suffered an injury for which they should be compensated, but the nature of their claims is such that they should be presented not to this court but to Congress.

In accordance with the foregoing opinion, it is ordered that the petitions of the respective plaintiffs be dismissed.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

BENJAMIN CLAYTON v. THE UNITED STATES

[No. J–129. Decided November 3, 1930]

On the Proofs

Income and profits tax; sec. 1116, revenue act of 1926; interest on credit; due date; additional assessment.—See *Riverside & Dan River Mills* v. *United States*, 69 C. Cls. 70.

Same; joint return of husband and wife; separate returns on community basis; allocation of overpayment on one to deficiency on other; interest.—The Commissioner of Internal Revenue may apply an overpayment made on a joint income-tax return of husband and wife in satisfaction of the tax due by the wife on a separate return computed on the community property basis. In so doing he in contemplation of law merely uses money that would apply to her tax liability on separate returns made in the first instance, and no interest is due thereon.

The Reporter's statement of the case:

Mr. John C. White for the plaintiff. *Fulbright, Crooker & Freeman* were on the briefs.

Mr. Charles R. Pollard, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant. *Messrs. Assistant Attorney General Herman J. Galloway* and *J. S. Franklin* were on the brief.

The court made special findings of fact, as follows:

I. Plaintiff, a resident of Houston, Texas, filed an individual income-tax return for the calendar year 1917 on May 21, 1918. This was a joint return of husband and wife and included the income of plaintiff's wife, Julia S. Clayton, and showed a total tax due of $9,634.32. No assessment was made on this return and no payment was made thereon.

June 17, 1918, plaintiff filed an amended income-tax return for 1917 in which was included the income of his wife, showing a tax due of $8,469.85, which was paid July 1, 1918.

II. April 21, 1919, he filed a joint tax return for himself and wife for the calendar year 1918 showing a tax of $394,460.99, which was paid in four installments of $98,615.25 on April 21, June 16, and September 17, 1919, and $98,615.24 on December 20, 1919.

III. March 14, 1920, he filed a joint return for himself and wife for the calendar year 1919 showing a tax of $439,377.09, $199,117.80 of which was paid in three installments of $109,844.27 on March 15, 1920, $39,494.08 on November 6, 1920, and $49,779.45 on December 17, 1920, leaving a balance of $240,259.29.

May 15, 1920, plaintiff filed an amended individual income-tax return of his income on a community-property basis for 1919 from which the community income of his wife, Julia S. Clayton, was eliminated, which amended return showed a tax due by him of $199,117.80. The collector of internal revenue at first refused this amended return and on October 28, 1920, returned it to plaintiff with the remittance thereon. Later, however, on November 5, 1920, the amended return was accepted by the collector together with the remittance for the portion of the tax due for 1919 up to and including that date. November 25, 1920, plaintiff filed a claim for abatement of $240,259.29 which was

subsequently, on March 23, 1921, allowed in full by the Commissioner of Internal Revenue, as shown by Schedule IT: 5502.

IV. March 15, 1921, plaintiff filed amended individual income-tax returns of his income on a community-property basis for 1917 and 1918 from which the community income of his wife, Julia S. Clayton, was eliminated. The amended return for 1917 showed a tax of $3,293.68 and that for 1918 showed a tax of $155,822.32. No assessments or payments were made on these returns.

With the aforesaid amended returns for 1917 and 1918 plaintiff and his wife, Julia S. Clayton, filed a claim asking that $85,962.99, income tax for 1916, 1917, and 1918, be credited in the amount of $42,981.50 against his unpaid balance of tax for 1920 and that $42,981.49 be credited against the unpaid portion of the income tax of his wife, Julia S. Clayton, for 1920.

V. March 15, 1921, the plaintiff filed a separate individual income-tax return on a community-property basis for the calendar year 1920 showing a tax of $153,605.95, of which amount $110,624.47 was paid in three installments of $33,821.48 on June 17, 1921, $38,401.49 on September 19, 1921, and $38,401.50 on December 15, 1921, leaving a balance of $42,981.50, which amount was covered by the claim for credit referred to above.

VI. March 15, 1922, plaintiff filed a separate individual tax return on a community-property basis for the calendar year 1921 showing a tax of $20,338.77, of which $15,254.08 was paid in three installments of $5,084.69 on March 17 and June 15, 1922, and $5,084.70 on September 15, 1922, leaving an unpaid balance of $5,084.69.

December 13, 1922, plaintiff filed an amended individual income-tax return for 1921 showing a total tax of $9,538.28. No assessment or payment was made on this return. At the time this amended return was filed, plaintiff filed a claim for the abatement of $5,084.69, being the amount of the last installment of tax for 1921, and for the refund of $5,715.80 of the tax paid for 1921.

VII. March 14, 1923, plaintiff filed a separate individual income-tax return on a community-property basis for 1922

showing a tax of $5,754.01, of which $116.27 was paid on April 2, 1923; $78.06 of the unpaid tax returned for 1922 was transferred on October 31, 1923, to the income-tax account of plaintiff's wife, Julia S. Clayton, for 1922, leaving an unpaid balance on his return for 1922 of $5,715.80. At the time plaintiff filed his return for 1922 he filed a claim asking that $5,715.80 of the tax assessed and paid for 1921 be credited against the unpaid balance of the tax in that amount shown on his return for 1922.

VIII. January 18, 1921, the Commissioner of Internal Revenue assessed an additional tax of $1,984.97 for 1917. January 25, 1921, the collector mailed plaintiff notice and demand for the payment of this additional assessment and on April 13, 1921, plaintiff filed a claim for the abatement of the amount of the additional assessment.

IX. April 30, 1923, the commissioner assessed an additional tax of $13,805.29 for 1917 and on May 4, 1923, the collector mailed to plaintiff notice and demand for the payment of the said assessment. June 6, 1923, plaintiff filed a claim for abatement of the entire amount of this additional assessment.

X. After an examination and an audit on a community property basis of the returns for 1917 and 1918, the commissioner on November 19, 1925, notified plaintiff that he had determined a deficiency in respect of his tax liability of $10,729.18 for 1917 and an overassessment on the joint return for 1918 of $313,550.32 in excess of his tax liability on a separate basis. The notice mailed by the commissioner included the income-tax computation of plaintiff's wife, Julia S. Clayton, for 1917 and 1918 showing deficiencies in respect of her tax liability of $10,729.18 for 1917 and $80,910.67 for 1918.

XI. After an examination and an audit of the joint income-tax return filed for 1919 and the separate income-tax returns filed by plaintiff for 1920 to 1922, inclusive, the commissioner by notice of December 3, 1925, notified the plaintiff that with respect to his separate tax liability he had determined an overassessment of $126,407.67 on the joint return for 1919, a deficiency of $220,216.92 on the separate return filed for 1920, and an overassessment of $6,182.55 for

1921 and a deficiency of $1,308.67 for 1922, the total of the deficiencies being $221,525.59 and the total of the overassessments being $132,590.22.

XII. February 24, 1926, the commissioner made an additional assessment of a deficiency of $10,729.18 for 1917.

XIII. March 11, 1926, the commissioner approved a schedule of overassessments, IT:A:19655, Form 7805, embracing an overassessment of $313,550.32 for 1918. This schedule was transmitted to the collector for his action in accordance with the directions appearing thereon. The collector complied and on March 24, 1926, signed and returned the schedule of overassessments to the commissioner, together with a schedule of refunds and credits, IT:R:19655, Form 7805–A. The last-mentioned schedule was approved by the commissioner April 27, 1926, authorizing the disbursing clerk of the Treasury Department to issue checks for the amounts shown thereon to be refundable to the several taxpayers whose names appeared on such schedule.

The overassessment of $313,550.32 on the joint return of plaintiff and his wife for 1918 was found to be an overpayment and was credited to the tax due by plaintiff and his wife, Julia S. Clayton, computed on the basis of separate returns, as follows:

Year to which credited	Amount of overpayment credited
Plaintiff's tax:	
Underpayment of tax for 1917	$1,984.97
Underpayment of tax for 1917	13,805.29
Underpayment of tax for 1917	10,729.18
Original tax for 1920	42,981.48
Original tax for 1922	5,715.80
Tax of plaintiff's wife:	
Original tax for 1917	24,260.11
Underpayment of tax for 1917	10,729.18
Original tax for 1918	75,692.95
Underpayment of tax for 1918	80,910.67
Original tax for 1920	42,981.47
Original tax for 1922	3,759.22
Total	313,550.32

XIV. April 8, 1926, the commissioner made additional assessments against plaintiff of a deficiency for 1920 of $220,216.92, with interest thereon of $1,571.68, and a deficiency for 1922 of $1,308.67.

Reporter's Statement of the Case

XV. April 15, 1926, the commissioner approved a schedule of overassessments, IT: A: 20181, Form 7805, embracing an overassessment in respect of plaintiff's tax of $126,407.67 on the joint return for 1919 and an overassessment on his separate tax return for 1921 of $6,182.55. This schedule was transmitted to the collector for his action in accordance with the directions appearing thereon. The collector complied and on April 29, 1926, signed and returned the schedule to the commissioner, together with schedule of refunds and credits, IT: R: 20181, Form 7805-A. The schedule of refunds and credits was approved by the Commissioner of Internal Revenue on June 1, 1926.

XVI. The overpayment of $126,407.67 for 1919 was credited against the additional assessment for 1920. Of the overassessment of $6,182.55 for 1921, $5,084.69 was abated and the balance of $1,097.86 was credited against the additional assessment for 1920.

XVII. May 3, 1926, the collector mailed notice and demand to plaintiff for the net additional tax due for 1920 in the amount of $92,711.39 and interest of $1,571.68, totaling $94,283.07, and for the total additional assessment for 1922 of $1,308.67 tax and $242.10 interest, totaling $1,550.77. These amounts for 1920 and 1922 were arrived at as follows:

Additional assessment		$220, 216. 92
Less:		
Overpayment for 1919 credited to 1920	$126, 407. 67	
Overpayment for 1921 credited to 1920	1, 097. 86	
		127, 505. 53
Balance due		92, 711. 39
Interest thereon		1, 571. 68
Net amount due		94. 283. 07
Additional assessment for 1922		1, 308. 67
Interest thereon		242. 10
Total		1, 550. 77

May 15, 1926, plaintiff paid to the collector the above-mentioned amounts due for 1920 and 1922.

XVIII. The commissioner determined and allowed interest on $94,437.97 of the overpayment for 1918 credited as set forth in Finding XIII, and allowed interest on the over-

Reporter's Statement of the Case

payment of $126,407.67 for 1919 credited against the additional assessment against plaintiff for 1920, as follows:

Year	Amount of overpayment credited	Amount on which interest was allowed	Interest allowed		Interest
			From—	To—	
1918	$313,550.32	$77,733.40	6/16/19	3/15/21	$8,118.34
		8,229.55	4/21/19	3/15/21	935.01
		2,846.80	4/21/19	3/15/23	665.06
		2,885.00	4/21/19	6/15/23	718.68
		2,304.72	4/21/19	9/15/23	608.70
		1,438.50	4/21/19	12/15/23	401.26
Total		94,437.97			
Total interest allowed					11,447.05
1919	126,407.67	49,779.45	12/17/20	3/15/21	710.55
		39,494.08	11/6/20	3/15/21	848.31
		37,134.14	3/15/20	3/15/21	2,228.05
Total		126,407.67			
Total interest allowed					3,786.91

No interest was allowed or paid on the amount of $218,112.35 of the overpayment for 1918 credited against the tax due from plaintiff for 1917 and against the tax due from plaintiff's wife, Julia S. Clayton, for 1917 and 1918.

No interest was allowed or paid on the overpayment for 1921 of $1,097.86 credited against the additional assessment for 1920.

XIX. No interest has been paid by plaintiff on the additional assessments for 1917 referred to in Findings VIII, IX, XII, nor on the additional assessments of tax for 1920 and 1922 referred to in Finding XIV, except $1,571.68 on the balance of the additional assessment due for 1920 and $242.10 on the additional assessment for 1922 as set forth in Finding XVII.

XX. June 16, 1926, the collector mailed plaintiff a certificate of overassessment of $313,550.32 for 1918 together with Treasury check for $11,477.05, the amount of interest determined and allowed by the commissioner thereon as set forth in Finding XVIII.

XXI. July 8, 1926, the collector mailed to plaintiff a certificate of overassessment of $126,407.67 for 1919, together with Treasury check for $3,786.91, the amount of interest determined and allowed thereon by the commissioner as set

forth in Finding XVIII and a certificate of overassessment of $6,182.55 for 1921 referred to in Findings XV and XVI.

XXII. August 12, 1927, a notice of refund on Schedule IT:25824 was mailed to the plaintiff, together with Treasury check for $239.80, interest refunded, which was determined as follows:

Interest paid on 1922 underpayment of tax	$242.10
Correct amount of interest thereon	16.94
Interest overpaid	225.16
Interest thereon from May 15, 1926, to June 15, 1927	14.64
Total	239.80

XXIII. August 25, 1926, plaintiff filed claim for additional interest of $112,564.20 on the overpayment for 1918 and $42,378.18 on the overpayment for 1919. By notice of March 24, 1927, the commissioner refused to allow and pay such additional interest, and he still refuses to allow and pay the same.

XXIV. At the time of the filing of the separate amended individual income-tax returns hereinbefore referred to for the years 1917 and 1918 by plaintiff and his wife, Julia S. Clayton, certain agreements signed by both of them regarding the disposition to be made of the tax theretofore paid for such years on the joint returns filed for these years were submitted and filed with the Commissioner of Internal Revenue. These agreements were that the total tax paid upon the original joint returns for 1917 and 1918 should be allocated equally in satisfaction of the tax due by each of them on their separate returns and that any balance should be applied as a credit against taxes due by them for 1920. These agreements are marked Exhibit 3 and, by reference, are made a part of this finding but need not be set forth herein.

XXV. The tax of plaintiff's wife, Julia S. Clayton, against which a part of the overpayment made on the original joint return for 1918 was credited, as shown in Finding XIII, was assessed for the years in the amounts and on the dates following:

Year	Amount assessed	Character of tax	Date of assessment
1917	$24,260.11	Original tax	April 30, 1923.
	10,729.18	Additional assessment	February 24, 1926.
1918	75,692.95	Original tax	March 8, 1924.
	80,910.67	Additional assessment	February 24, 1926.
1920	42,981.47	Original tax	
1922	5,786.02	Original tax	

XXVI. On May 4, 1923, notice and demand was issued for the tax due by plaintiff's wife, Julia S. Clayton, in the amount of $24,260.11 for 1917 above referred to, and on March 14, 1924, notice and demand was issued for the tax due by her in the amount of $75,692.95 for 1918.

XXVII. The property from which plaintiff and his wife, Julia S. Clayton, derived their income for the years involved was community property and the tax paid by plaintiff and his wife was all paid out of undivided community funds, being the community property of plaintiff and his wife, Julia S. Clayton.

The court decided that plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

This case involves a claim for additional interest upon overassessments on joint returns filed for 1918 and 1919, which overassessments, so far as they had been paid, were allocated to the separate tax liability of plaintiff and his wife when determined on the community property basis and certain portions of the amounts were credited against additional assessment. The credits were all taken after the approval of the revenue act of 1926, 44 Stat. 119, and the allowance of interest thereon is governed by section 1116 of that act.

The commissioner allowed no interest upon the portions of the overassessments on the joint returns for 1918 and 1919 which were allocated and applied in satisfaction of the tax finally determined by him to be due separately by plaintiff and his wife, Julia S. Clayton, on the community property basis. On all other credits in controversy against orig-

inal and additional taxes the commissioner allowed and paid interest to the due dates of such taxes, such "due dates" being determined by him to be the dates fixed by law for the payment of tax in installments upon the filing of returns for the years involved.

Plaintiff insists, first, that the additional assessments against which the credits were taken were additional assessments "made under" the revenue acts of 1924 and 1926 and that under the provisions of section 1116 of the revenue act of 1926 interest on the amounts so credited was payable to the dates of the additional assessments; secondly, that if the additional assessments were not made under the revenue act of 1926, but under the revenue acts of 1916 and 1918, the due dates of the additional tax under section 250 (b) of the revenue act of 1918 was the date on which the collector gave notice and made demand; thirdly, that when the tax of plaintiff and his wife was computed separately on the community property basis the overassessments of the tax as shown assessed and paid on the original joint returns of plaintiff and his wife for 1918 and 1919 were overpayments by the plaintiff and when a portion of such tax was allocated in satisfaction of the tax due by Mrs. Clayton on the community property basis, interest was payable on such amounts to plaintiff as provided by section 1116 of the 1926 act as in the case of other credits.

The defendant contends, first, that notwithstanding some of the additional assessments involved were made on dates subsequent to the enactment of the revenue act of 1921 they were for years prior to 1921 and were "made under" prior revenue acts as that term is used in section 1116 of the revenue act of 1926; secondly, that, as used in section 1116, the "due date" is the date on which the tax should have been paid and is the same as the date fixed for the payment of the original tax or the installments thereof; thirdly, that no interest was payable upon that portion of the tax paid upon the original joint returns which was allocated to the tax due by Mrs. Clayton on a separate community property basis because the payment of that amount on the original joint return was merely a payment by her in respect of her tax.

The first two questions are the same as those considered and decided by this court in *Riverside & Dan River Cotton Mills, Inc.* v. *United States*, 37 Fed. (2d) 965. [69 C. Cls. 70.] For the reasons stated in that case we hold that the defendant is correct in its contention and that plaintiff is not entitled to additional interest claimed upon the ground stated.

On the third issue, we are of opinion that the Commissioner of Internal Revenue correctly refused to allow and pay interest upon that portion of the overassessment on the original joint returns subsequently allocated to the tax determined to be due by Mrs. Clayton computed on the community property basis. The correctness of the determination of the income and the tax due by plaintiff and his wife on the community property basis and their right to report their income on the community property basis is not in question. When the original joint returns of plaintiff and his wife were made and the tax shown thereon was paid, a part of the tax was paid on the community income belonging to the wife and out of community funds belonging to her. To the extent, therefore, of the payment of the original tax on the entire income shown on these returns which should have been paid by the wife, it was her tax paid out of community funds. When the Commissioner of Internal Revenue upon the claim of plaintiff and his wife determined and computed the income and the tax separately on the community property basis and allocated a portion of the tax returned and paid upon the joint returns to the tax due by the wife upon that portion of the community income allocated to her he was in contemplation of law using her money which had been paid on the joint return out of undivided community funds in respect of the tax for which she would have been liable had separate returns been filed in the first instance. To the extent, therefore, of the tax liability of the husband and the wife when the income shown on the joint returns was divided between them, there was, in reality, no overpayment. But, for administrative purposes, the commissioner correctly treated the excess of the tax shown and assessed on the joint return over that due by the plaintiff on a separate basis as an overassessment since he signed the return and his name only appeared on the assessment list.

The community fund is an undivided fund in which the husband and the wife each have a one-half interest.

The contention of plaintiff that the provisions of section 284 (a) of the revenue act of 1926 with reference to the crediting of an overpayment on a return against any tax "then due by the taxpayer" must be literally construed; that the authority of the commissioner is thus expressly limited to crediting overpayments to the tax due from the particular taxpayer; that the commissioner has no legal authority in the case of a division of community income on a joint return equally between the husband and wife to credit one taxpayer's account with an overpayment by another taxpayer, argues against the claim that he and his wife had a right under the statute to make separate community property returns. We are of opinion that there is no merit in plaintiff's contention on the third issue.

The petition must be dismissed, and it is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear this case and took no part in the decision thereof.

HUGH RODMAN v. THE UNITED STATES

[No. J-269. Decided November 3, 1930]

On the Proofs

Navy pay; subsistence and rental allowance; retired rear admiral on active duty.—Section 17 of the act of June 10, 1922, did not repeal the act of August 29, 1916, with respect to active-duty pay for a retired officer of the Navy. Plaintiff, in the upper half of the grade of rear admiral at the time of his retirement, was for active duty after retirement entitled to the active-duty pay and allowances of a lieutenant commander (act of August 29, 1916).

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *Mr. John W. Gaskins* and *King & King* were on the brief.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff entered the Navy as a midshipman at the Naval Academy and after serving through the successive commissioned grades became a rear admiral May 23, 1917, and was retired on January 6, 1923, by reason of attaining the legal age of retirement, sixty-four years.

At and prior to the time of his retirement he was in the upper half of the grade of rear admiral as defined by law and was entitled to pay at the rate of $8,000 per annum. After his retirement he received $6,000 per annum.

II. Subsequent to the date of his retirement plaintiff received the following orders dated June 8, 1923:

"1. On or about 20 June, 1923, you will proceed with the President of the United States to Alaska.

"2. The above assignment to active duty is subject to your consent and when directed by the President you will return to Washington, D. C., and regard yourself relieved from all active duty.

"3. The Secretary of the Navy has determined that this employment on shore duty and on shore duty beyond the seas is required by the public interests."

Pursuant to the above orders, on June 20, 1923, plaintiff accompanied President Harding to Alaska. His subsequent orders and movements are shown by the following endorsement:

"Directed to proceed to Washington, D. C., by order of the President, Aug. 1, 1923. Left San Francisco, Calif., Aug. 1, 1923. Arrived Washington, D. C., by public conveyance Aug. 7, 1923, duty completed this date."

Thereafter on August 7, 1923, the following orders were issued to him:

"1. You will proceed to Marion, Ohio, for duty to attend the funeral of Warren G. Harding, late President of the United States.

"2. The Secretary of the Navy has determined that this employment on shore duty is required by the public interest.

"3. The above assignment is subject to your consent and upon the completion of this duty you will return to Washington, D. C., and regard yourself relieved from active duty."

Opinion of the Court

In pursuance of the above orders, plaintiff continued on active duty and left Washington, D. C., on August 8, 1923, to attend the funeral of President Harding at Marion, Ohio, and upon completion of that duty returned to Washington, D. C., arriving August 10, 1923.

III. During all the time covered by this claim plaintiff had a wife, was receiving $6,000 per annum, retired pay of a rear admiral, but received no subsistence or rental allowances. If entitled to active duty pay of a lieutenant commander, an increase of 50% longevity, together with rental and subsistence allowance, there is due the plaintiff the sum of $170.

The court decided that plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff, on May 23, 1917, became a rear admiral in the Navy. On January 6, 1923, he was placed upon the retired list, having attained the legal age of retirement. Prior to his retirement the plaintiff was receiving pay at the rate of $8,000 per annum, the pay legally due a rear admiral in the upper half of the grade of rear admiral. Subsequent to his retirement his pay continued at the rate of $6,000 per annum.

On June 8, 1923, the plaintiff received an order to accompany President Harding to Alaska. This order was a lawful one and not challenged. On June 20, 1923, the plaintiff obeyed the above order and he continued with President Harding until August 1, 1923, when an order detached him from duty and directed his return to Washington. Subsequent to his arrival in Washington and on August 7, 1923, another order directed the plaintiff to attend the funeral of President Harding at Marion, Ohio; this latter duty being discharged by leaving Washington August 8, 1923, and returning to Washington August 10, 1923. The plaintiff during all this period of time was a married man, a rear admiral of the Navy of more than thirty years' service, performing the above active duty with his consent. For the active service performed by plaintiff he has received his

pay as a rear admiral of the upper half on the retired list and mileage for distances traveled. He now sues to recover what is alleged as his lawful pay for this short period of active duty, under the provisions of the act of August 29, 1916 (39 Stat. 581), which is in terms as follows:

"* * * hereafter any retired officer of the naval service who shall be detailed on active duty shall, while so serving, receive the active duty pay and allowances of the grade, not above that of lieutenant commander in the Navy or of major in the Marine Corps, that he would have attained in due course of promotion if he had remained on the active list for a period beyond the date of his retirement equal to the total amount of time during which he has been detailed on active duty since his retirement: *Provided*, That nothing herein shall be construed to reduce the pay of any retired officer on active duty whose retired pay exceeds the active duty pay and allowances for the grade of lieutenant commander."

The plaintiff's claim for extra pay as herein contended for was denied him upon a holding that section 17 of the act of June 10, 1922 (42 Stat. 625), repealed the act of August 29, 1916 (*supra*), and hence no provision of law authorized a greater pay to him than his retired pay of $6,000 per annum. Section 17 of the act of June 10, 1922, is as follows:

"That on and after July 1, 1922, retired officers and warrant officers shall have their retired pay, or equivalent pay, computed as now authorized by law on the basis of pay provided in this Act: *Provided*, That nothing contained in this Act shall operate to reduce the present pay of officers, warrant officers, and enlisted men now on the retired list or officers or warrant officers in an equivalent status of any of the services mentioned in the title of this Act. * * * Retired officers of the * * * Navy, * * * below the grade of brigadier general or commodore and retired warrant officers and enlisted men of those services, shall, when on active duty, receive full pay and allowances."

It is conceded that if the plaintiff is entitled to the pay and allowances of a lieutenant commander in the Navy under the act of August 29, 1916, he is entitled to a judgment for $170. So that the sole issue involved is whether the seventeenth section of the act of June 10 1922, repealed the

Opinion of the Court

prior act of August 29, 1916, with respect to active-duty pay for a retired officer of the Navy. The seventeenth section of the act of June 10, 1922, contains no express provision for the pay of a retired Naval officer on active duty with the rank and grade of the plaintiff. The section does provide expressly for active-duty pay to all retired officers of the Army and Navy below the grade of brigadier general or commodore, and awards such officers full active-duty pay and allowances. The plaintiff obviously does not fall within this provision, and unless it may be held that the act of June 10, 1922, repeals the prior act of August 29, 1916, this latter act unquestionably fixes the pay and allowances due the plaintiff for active-duty service. The Comptroller General in a decision dated August 9, 1924, awarding plaintiff mileage for travel involved in this precise active-duty service, held, "The provision of the act of August 29, 1916, remaining applicable to Rear Admiral Rodman while on active duty, he is entitled under section 12 of the act of June 10, 1922, to mileage for travel performed under his order of June 8, 1923." (Bureau Memo., 1924, p. 8665.) Subsequently, on May 1, 1925, the Comptroller General denied the plaintiff the pay herein contended for, holding, among other things, as follows:

"The subsistence and rental allowance are not payable to a retired officer on active duty if above the grade of colonel in the Army or captain in the Navy. The subsistence allowance provided by section 5 of the act of June 10, 1922 (42 Stat. 628), is payable only to a 'commissioned officer on the active list or on active duty below the grade of brigadier general or its equivalent,' and the same is true of rental allowance provided by section 6 as amended by the act of May 31, 1924 (43 Stat. 250).

* * * * *

"Admiral Rodman is not entitled to the pay claimed because the active-list pay of a lieutenant commander after 30 years' service is $5,250 and the retired pay of a rear admiral of the upper half is $6,000, the retired pay being greater."

The two opinions of the comptroller when considered together would, without the modification, result in excluding from the act of June 10, 1922, all officers above the grade of

commodore, in so far as active-duty pay is concerned, and yet deny to such officers the allowances provided for them under the act of August 29, 1916. In other words, the base pay of a lieutenant commander could be, under the act of August 29, 1916, awarded them, but the allowance expressly therein given them must be withheld because the fifth section of the act of June 10, 1922, provides for allowances to retired officers on active duty below the grade of commodore. We cite these opinions of the comptroller not in criticism of what has been held, but as to the existence of manifest difficulties and complications which are involved in the solution of this issue.

As pointed out by this court in the case of *Gladys H. Thomson* v. *United States*, 58 C. Cls. 207, retired officers of the Navy at first could not be detailed to active duty except "in time of war." (Sec. 1462, Revised Statutes.) Subsequently, on August 22, 1912, an act of Congress authorized their detail to active duty with their consent, and thereafter the act of August 29, 1916, was enacted fixing the pay for active-duty service. In 1922 Congress was fully aware of the legal status with respect to active-duty pay of retired officers above the rank of brigadier general or commodore, and surely we may not ascribe to Congress an intention to disturb their rate of pay as then fixed by expressly limiting the application of section 17 of the act of June 10, 1922, to retired officers below the above grades. It is, we think, impossible to find in the act of June 10, 1922, any provision fixing the active-duty pay of a naval officer of the grade of the plaintiff herein. In all the various sections of the act of June 10, 1922, apropos of active-duty pay to retired officers and allowances granted by law, the scope of the act is expressly and designedly limited to officers below the grade of brigadier general or commodore. The title and enacting clause of the act itself read in part as follows:

"An Act To readjust the pay and allowances of the commissioned and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

That, beginning July 1, 1922, for the purpose of computing the annual pay of the commissioned officers of the Regular Army and Marine Corps below the grade of brigadier general, of the Navy below the grade of rear admiral, * * *."

Both the acts of 1916 and 1922 are contained in the United States Code Annotated, enacted by Congress in 1926. Just why the court should infer, in the absence of facts other than as appear of record, that Congress intended to repeal the act of 1916 by enacting the seventeenth section of the act of 1922 is not sustained by any other argument in defendant's brief than the bold statement that it is so. It is true that under the circumstances of this particular case denial of allowances might not work a hardship, but pay and allowances granted by law may not be predicated upon isolated cases. It is quite easy to foresee a detail to active duty upon the part of a retired officer of the Navy of the rank and grade of the plaintiff wherein the withholding of the allowances granted by the act of 1916 would work a hardship. Aside from the familiar rule of repeals by implication, it is difficult, if not impossible, to discover any provision of the act of June 10, 1922, inconsistent with the provisions of the act of 1916 in so far as herein involved. Congress was aware of retired officers on the naval list above the rank of commodore. It likewise possessed knowledge of retired officers above the rank of brigadier general in the Army, and we are not at liberty to extend express limitations of an act of Congress to the extent of comprehending officers not mentioned therein, when existing law provides for their pay and allowances.

We think the plaintiff is entitled to recover. Judgment for the plaintiff for $170. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge,* concur.

WHALEY, *Judge*, did not hear this case and took no part in its decision.

J. F. MORENO v. THE UNITED STATES

[No. K–456. Decided November 3, 1930]

On the Proofs

Jurisdiction; United States commissioner; Comptroller General; use of judicial discretion.—(1) Whether a criminal case should have been heard immediately by a United States commissioner without commitment of the prisoner and whether such a case should have been disposed of without a continuance, are questions determinable by the commissioner and not reviewable by the Comptroller General in his audit of the commissioner's claim for fees.

(2) Only the arbitrary use or abuse of judicial discretion can be looked into.

(3) In hearing and deciding upon criminal charges a United States commissioner acts in a judicial capacity.

The Reporter's statement of the case:

The plaintiff *in propria persona.*

Mr. John E. Hoover, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a duly qualified United States commissioner for the district of Arizona, residing at Prescott, Arizona, having been appointed on March 17, 1925, for a period of four years by the United States Judge for the district of Arizona.

II. On the sixth of July, 1928, a criminal complaint was filed with the plaintiff, as United States commissioner, against one John Guidi, and on the same day the defendant (Guidi) appeared for examination upon the charge. The commissioner, being on that day engaged in the hearing of another criminal case against William S. Hall, et al., set the case against Guidi for hearing on the following day, July 7th, and required of the defendant a bond for his appearance. The defendant, Guidi, not being able to furnish bond, the commissioner issued a temporary mittimus committing him to jail and delivered the mittimus with the

prisoner to the United States marshal, who on the same day returned the mittimus, duly executed, and the commissioner entered the return of the mittimus in his official docket.

On July 7th, 1928, the hearing of the charge against Guidi was commenced and completed.

III. On or about the 24th day of October, 1928, the plaintiff filed in the United States court for the district of Arizona his account, duly sworn to, for fees earned during the quarter ending September 30, 1928, and claimed in the Guidi case a fee of one dollar for issuing a temporary mittimus; a fee of fifteen cents for entering the return of the mittimus in his official docket; and a per diem fee of five dollars for hearing and deciding the criminal case against Guidi on the 7th day of July, 1928.

The account stated the Guidi case could not be heard on July 6th "because of other business." In a letter from the bookkeeping division, General Accounting Office, dated January 14, 1929, the plaintiff was informed:

"Charge for temporary commitment, return, and hearing suspended for necessity for continuance. 'Case could not be heard on July 6 because of other business' is not deemed by this office to be a satisfactory explanation of necessity for continuance."

On January 24, 1929, the plaintiff replied to the letter of the General Accounting Office, bookkeeping division, as follows:

"My quoted statement does not indicate that there was any continuance. There was no arraignment, no hearing, and therefore no continuance on July 6; merely a setting for hearing on subsequent date, and commitment in default of bond. My account will show that on July 6 I held another hearing (case #527) which is the 'other business' referred to."

On May 23, 1929, the General Accounting Office, bookkeeping division, informed the plaintiff that the suspended items were—

"disallowed. It is not shown that hearing could not have been completed on July 6."

The plaintiff requested a review by the Comptroller General of the disallowance of the suspended items and was

informed by letter dated August 6, 1929, from the General Accounting Office, bookkeeping division, that the disallowance was sustained because "It has not been shown why more than one hearing could not be held July 6."

IV. On July 27, 1928, the plaintiff, as United States commissioner, commenced a preliminary examination upon a criminal complaint duly filed with him against one Tom K. Dunbar and another; during the course of said hearing a motion was made by counsel for defendants for a continuance until the following day and the motion was granted by the commissioner; thereafter an assistant United States attorney for the district of Arizona, appearing for the United States, moved that the hearing be further continued until the 30th of July, 1928, which motion was likewise granted by the plaintiff. On the 30th of July, 1928, the hearing was resumed and completed. On or about the 24th of October, 1928, the plaintiff filed in the United States District Court for the District of Arizona his quarterly accounts for fees earned during the quarter ending September 30, 1928, and claimed a per diem fee of five dollars for the partial hearing on July 27th and an additional per diem fee of five dollars for the final hearing on July 30th. In the account filed, plaintiff stated the hearing had been continued from July 27th to July 30th on motion of defendant's counsel and the United States attorney.

By letter of January 14, 1929, the plaintiff was informed by the General Accounting Office, bookkeeping division—

"Charge for hearing on continued date suspended, for necessity for continuance. '* * * on motion of defendant's counsel and U. S. attorney' is not deemed by this office to be sufficient showing of necessity."

On January 24, 1929, the plaintiff replied, in part as follows:

"As a matter of fact, this continuance was granted at about 7.30 p. m. * * *."

By letter dated May 23, 1929, from the General Accounting Office, plaintiff was informed the fee for the continued hearing in the Dunbar case on July 30, 1928, was disallowed for the reason—

"'motion for continuance granted at request of defendant's counsel and U. S. Attorney' without explanation as to reason for this motion is not deemed sufficient."

The plaintiff thereafter requested a review by the Comptroller General of the disallowance of the additional per diem fee, and on August 6, 1929, was informed by the General Accounting Office, bookkeeping division, the disallowance was sustained for the reason that "supporting reason for request for continuance not shown as requested."

The court decided that plaintiff was entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

The plaintiff is a United States commissioner for the district of Arizona under an appointment of the district judge. It appears that on the sixth day of July, 1928, while engaged in the hearing of a criminal complaint against one Hall, another criminal case against one Guidi was brought before him for a hearing, and he set the hearing in the second case for the following day, July 7th. The defendant (Guidi) not being able to furnish bail as required, the commissioner issued a temporary mittimus committing the defendant to jail and delivered the mittimus to the United States marshal, who returned the mittimus, duly executed, to the plaintiff who entered the return in his docket. In rendering his quarterly itemized account for statutory fees the plaintiff claimed a fee for the hearing of the Hall case on the sixth of July, which was allowed by the General Accounting Office, (1) a fee for issuing the temporary mittimus, (2) a fee for entering the return, and (3) a per diem fee for hearing and deciding the case against Guidi on the seventh of July. In the explanation of his accounts for fees and charges in the Guidi case the plaintiff gave as his only reason for not hearing the case, on the day it was brought before him, "Case could not be heard on July sixth because of other business." The bookkeeping division of the General Accounting Office suspended these items, taking the position that other business "is not deemed by this office to be a satisfactory explanation for the necessity of continuance." Subsequently the bookkeeping division dis-

allowed these items for the reason "it is not shown that hearing could not have been completed on July sixth," and upon the request for a review by the Comptroller General of the disallowed items, the plaintiff was informed that this disallowance was sustained because "it has not been shown why more than one hearing could not be heard on July sixth."

In the second instance it is alleged that on July 27, 1928, the plaintiff, while holding a preliminary examination upon a criminal complaint, granted a motion, made by defendant's counsel, for a continuance to the next day, and later granted a motion to continue the case to the 30th of July, which latter motion was made by the assistant United States attorney. On the 30th of July the hearing was resumed and completed. In filing his quarterly account the commissioner charged the statutory fee for the partial hearing on the 27th of July and an additional per diem fee for the final hearing on the 30th of July. The account when filed stated that the hearing had been continued on the respective dates on motion of defendant's counsel and the United States attorney. The Government contends the mere statement a continuance was granted at the request of defendant's counsel and the United States attorney is not sufficient showing of necessity for a continuance and the reasons for granting the motion should be furnished it. There is no dispute the account was properly filed in the clerk's office or the statutory per diem fees were charged.

The amount of this claim is very small and not in proportion to the legal question involved. The real issue is whether the administrative branch of the Government, before passing the account for fees of a commissioner of a district court, can require of him reasons, satisfactory to the administrative branch, for acts on his part which involve the exercise of his discretion in the hearing of criminal cases brought before him. Both of these acts on the part of the commissioner were well within the exercise of his judicial discretion, and the courts have uniformly held that when soundly used it can not be disturbed. Only the arbitrary use or abuse of this discretion can be looked into. *Isaacs* v. *United States*, 159 U. S. 487. Certainly the wrong-

ful use of his discretion would not lie within the purview of the administrative branch of the Government, but would fall within the sphere of the appointing power, which in the case of United States commissioners is the district judge who made the appointment. There is a regular channel through which the attention of the district judge can be called to any misconduct of his appointees.

In the case of the *United States* v. *Ewing*, 140 U. S. 142, it is said by Mr. Justice Brown, p. 150:

"While it is doubtless the duty of the commissioner to make as speedy a disposition of cases as is possible, consistent with a due regard for the interests of the Government and the protection of the accused, we held in *United States* v. *Jones*, 134 U. S. 483, that in hearing and deciding upon criminal charges he acted in a judicial capacity and we have no doubt he is invested with a discretionary power to suspend the hearing of a case where, in his judgment, a proper regard for the interest of justice requires it."

In both instances in the case before us the commissioner was acting in his judicial capacity upon criminal charges and was called upon to exercise his discretion. In the first instance, he had to calculate and decide how long the criminal hearing he was engaged in would take. The very nature of these hearings precludes any definite and accurate calculation. Error on the greater length of time is not material but the arbitrary closing of a hearing within a certain fixed time may not be a proper regard for the interest of the Government or the accused. There has not been brought to our attention any statutory provision, or rule of court, which requires a commissioner to work any definite or regular number of hours a day. This is left to his conscience as a faithful officer of the court. When the account shows, as it does, a hearing was held by him on July 6 and a case had been postponed to the following day because of "other business" before him, we think it is amply sufficient to show his time during that day was so fully occupied with the hearing before him that justice to all concerned required the actual hearing of the second case to be carried over to the following day. The explanation was sufficient for the auditing department to know for what services the

Opinion of the Court

fees charged in the account had been rendered. We think the commissioner is entitled to the fee for hearing the Guidi case on July 7, the fee for the mittimus, and the fee for entering the return in his docket.

In the second instance the commissioner charged a fee for the day to which the case had been continued, and the comptroller has disallowed this item on the ground that the mere statement in the account that the motion for a continuance was made by the defendant's counsel or district attorney is not a sufficient explanation to audit and pass the item.

In the case of *United States* v. *Jones*, 134 U. S. 483, the court said, "With respect to motions for continuance, the granting or refusal of them is unquestionably a necessary incident to, and a part of, the hearing and determining of criminal charges; and the exercise of that power in such criminal proceedings is indispensable to the right of the accused to have a fair and full investigation of the offense charged against him and to a sufficient time for the summoning of his witnesses, as well as for the employment and consulting with counsel to aid in his defense." In order to have his account audited and passed by the General Accounting Office we do not believe it is necessary for the commissioner to set out in detail the grounds on which the motion for a continuance was based. The granting or refusal of the motion was solely within his discretionary power. It is the business of the accounting department to make a careful investigation of all accounts, to check the calculations, examine the vouchers and see the items charged are not above the amounts allowed in the statutes, but the exercise of judicial functions in passing on the legality of the respective items belongs to another and separate branch of the Government. *Dennison* v. *United States*, 25 C. Cls. 304. To concede to the accounting department the right to require of the commissioner an explanation, which would be satisfactory to it, of his acts while acting in a judicial capacity would be a clear infringement and impairment of the right of absolute freedom from control when exercising his sound discretion. It would be equivalent to, and act as, a review of the facts and circumstances actuating him in arriving at a decision in matters which involve the exercise of the unquestionable dis-

cretionary powers with which his office is endowed when hearing criminal cases. It would be conceding to the administrative branch a right which is not enjoyed even by the appellate courts.

The brief filed with the court on behalf of the defendant consists solely of a report of the Comptroller General to the Department of Justice requesting a vigorous defense. No authorities are cited to sustain its contentions. On its face, it is an implied confession of judgment.

Judgment for plaintiff for $11.15. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

MEYERSDALE FUEL CO. v. THE UNITED STATES

[No. J-261. Decided November 3, 1930]

On the Proofs

Income and profits tax; return erroneously consolidated; reallocation by Commissioner of Internal Revenue; refund to returning corporation.—Where a corporation files a consolidated income and profits tax return for subsidiary companies that are not under the law affiliated, pays the tax so returned, collecting from each subsidiary its share thereof, and the Commissioner of Internal Revenue without further assessment allocates the payment to each company's liability computed individually, the application so made was proper. The corporation making the return was not the taxpayer except as to its own liability, but was merely the medium through which the others made payment, and was not entitled to refund or credit of the difference between the tax paid on the entire consolidated return and the amount due individually.

The Reporter's statement of the case:

Mr. R. Lester Moore for the plaintiff. *Messrs. John T. Duff, jr.*, and *J. S. Y. Ivins* were on the briefs.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Charles B. Rugg*, for the defendant. *Mr. Charles F. Kincheloe* was on the brief.

The court made special findings of fact, as follows:

I. Plaintiff, a Pennsylvania corporation with principal place of business at Somerset, is engaged in business of mining and shipping coal. March 15, 1921, it filed a consolidated income and profits tax return for the calendar year 1920 which included the income and invested capital of the Randolph Coal Company, the Smokeless Quemahoning Coal Company, and the Franklin Gas Coal Company, hereinafter referred to as the Randolph, Smokeless, and Franklin companies. This return was mailed to the collector by plaintiff on March 11, 1921, and disclosed a tax liability for the consolidated group of $109,639.03 which was duly assessed on March, 1921, list against the Meyersdale Fuel Company who executed the return and whose name only appeared at the head of the return in the place provided for that purpose. The total tax shown on this return was paid to the collector by the plaintiff by its checks for $27,409.76 on March 15, 1921, $27,409.78 on June 15 and September 16, and $27,409.71 on December 15, 1921. These checks were dated and mailed to the collector on March 11, June 13, September 14, and December 13, respectively. Prior to the time of each payment by plaintiff to the collector a charge was set up on its books against the Franklin, Smokeless, and Randolph companies for their proportion accrued income and profits tax shown on the consolidated return for 1920. These debits on plaintiff's books against each of the other three companies mentioned were credited by the following amounts received from each of them respectively:

Franklin Gas Coal Company	Smokeless Quemahoning Coal Company	Randolph Coal Company
$21,544.07	$493.37	$1,762.45
21,544.07	493.37	1,762.45
21,544.07	493.37	1,762.45
21,544.07	493.37	1,762.45
86,176.28	1,973.48	7,049.80

These amounts were received by plaintiff from said companies in reimbursement of charges made as aforesaid in four equal installments of $21,544.07 on March 28, June 13,

September 14, and December 14 from the Franklin Company, and four equal installments of $493.37 on March 16, June 13, September 14, and December 14 from the Smokeless Company, and four equal installments of $1,762.45 on March 16, June 13, September 14, and December 14 from the Randolph Company.

The amount of tax shown on the consolidated return and paid by the plaintiff out of its own funds without reimbursement was $14,439.47, for which charges were made upon its books of $3,609.87 on March 15, 1921, $3,609.86 each on June 15 and September 15, and $3,609.88 on December 15, 1921.

II. At the time the consolidated return was filed the Franklin, Smokeless, and Randolph Companies filed information returns, Form 1122, which returns are marked Exhibits B, C, D, and E, respectively, and by reference are made a part of this finding. These returns showed the plaintiff as the parent corporation and under item 7 thereof they stated that "If apportionment [of the tax] is made, state the amount of income and profits tax for the taxable period to be assessed against the subsidiary or affiliated corporation making this return." These companies wrote the word "None." There was an agreement among the corporations included in the consolidated return that the total tax shown thereon should be paid through the plaintiff, but there was no agreement among the corporations that plaintiff would assume the tax liability of the other corporations.

III. The Franklin Company also filed a return of its income and invested capital for the calendar year 1920 on March 30, 1922, on Form 1120, showing a tax liability of $82,279.69, and at the bottom of the first page of this return following the computation of tax this company wrote these words: "Tax has been paid through Meyersdale Fuel Company, Somerset, Pennsylvania. See attached memorandum." The memorandum referred to and attached to said return stated as follows: "This income and profits tax return for the calendar year 1920 is filed [to] conform to instructions in office letter, reference IT: SA: CR: AF: EHN, copy of which is attached hereto. The consolidated return of the Meyersdale Fuel Company for the year 1920 included the

Franklin Gas Coal Company and the tax so paid by the Meyersdale Fuel Company is sufficient to cover the liability of the Franklin Gas Coal Company as shown on this return." On February 15, 1928, the commissioner mailed to plaintiff a letter advising it that the corporations hereinbefore mentioned were not affiliated for 1920. There is no question in this case as to the correctness of this decision of the commissioner.

IV. On January 18, 1926, the plaintiff and the Franklin, Smokeless, and Randolph companies each, and the commissioner entered into written consents extending the statute of limitation with reference to the year 1920 to December 31, 1926. These consents contained provision that if upon the commissioner's final determination no appeal was filed with the United States Board of Tax Appeals the date would be extended 60 days and that if an appeal should be filed then the date should be extended by the number of days between the date of the mailing of the commissioner's notice and the date of the final decision of the said board.

V. February 26, 1926, the commissioner mailed to the Franklin Company a 30-day letter showing his computation of its tax liability on a separate basis for 1920. On May 5, 1926, the commissioner mailed to this company a 60-day letter setting forth his final determination under the statute in respect of its tax liability for 1920 showing its total tax for that year of $82,279.69. This tax plus interest of $1,-645.59, totaling $83,925.28, was assessed by the commissioner against this company on the June, 1926, special list.

VI. February 26, 1926, the commissioner mailed to the Smokeless Company, a 30-day letter showing his computation of its tax liability for 1920 on a separate basis. May 5, 1926, the commissioner mailed to this company a 60-day letter showing his final determination under the statute in respect of its tax liability for 1920 showing a total tax for that year of $2,852.80. This tax plus interest of $57.06, totaling $2,-909.86, was assessed against this company on the June, 1926, special list.

VII. February 26, 1926, the commissioner mailed to the Randolph Company a 30-day letter showing his computation of its tax liability on a separate basis for 1920 and 1921.

April 25, 1926, the commissioner mailed to this company a 60-day letter showing his final determination under the statute in respect of its tax liability for 1920 and 1921, disclosing a tax for 1918 of $6,580.48 and additional tax of $1,405.43, totaling $7,985.91. The tax of $6,580.48 determined for 1920 plus interest of $131.61, totaling $6,712.09, was assessed by the commissioner against this company on the June, 1926, special list.

VIII. February 17, 1926, plaintiff filed a claim for refund of $96,638.56 on the grounds that it filed a consolidated return and paid the total tax shown on such return.

The department decided that the corporations were not affiliated and in a letter of February 12, 1926, stated:

"You have filed a consolidated return for the year 1920 covering the Franklin Gas Coal Company, Smokeless Quemahoning Coal Company, and the Randolph Coal Company. It is now held by this office that you are not affiliated with any of these corporations for the year in question. The entire tax shown on the consolidated return was assessed against you, resulting in the overassessment indicated above.

"In order fully to protect yourself against the running of the statute of limitations with respect to the apparent overassessment referred to in this letter, it is suggested that you immediately file with the collector of internal revenue for your district a claim on the enclosed Form 843, the basis of which may be as set forth herein."

August 19, 1926, the commissioner mailed a registered notice to plaintiff in which he stated "An examination of your income and profits tax return and of your books of account and records discloses an overassessment of $96,038.23 for the year 1920 as shown on the attached statement and schedules. Certificate of overassessment for the amount specified above will be issued through the office of the collector of internal revenue for your district and will be applied by that official in accordance with the provisions of section 284 (a) of the revenue act of 1926." This letter was received by plaintiff August 21, 1926, and had reference to the audit of the consolidated return hereinbefore referred to, and the overassessment mentioned represented the difference between the total tax of $109,639.03 shown and paid on the consolidated return and the plaintiff's correct separate tax lia-

bility of $13,600.80. The commissioner transmitted to the collector of internal revenue the result of his decision with respect to the tax liability of plaintiff and his audit of the consolidated return, together with a certificate of overassessment for $96,038.23 in the name of the plaintiff. The collector upon examination of his account with the plaintiff, which account showed that the plaintiff had been credited with the total tax of $109,639.03 shown and assessed on the consolidated return, reported an overassessment of $96,-038.23 to the commissioner as refundable.

IX. July 6, 1927, the commissioner having made a final determination in respect of the tax due by the several corporations which had been included in the consolidated return on a separate basis, instructed the collector that the difference between the total tax shown and paid on the consolidated return and the correct tax liablity of the Meyersdale Fuel Company should be used by him in satisfaction and discharge of the tax due by the Franklin, Smokeless, and Randolph companies. The commissioner's letter of instructions to the collector was as follows:

"Transmitted herewith is supplemental Schedule #21798 (Form 7920) with certificate of overassessment in the amount of $96,038.23 allowed in favor of the Meyersdale Fuel Company, Somerset, Pennsylvania.

"The overassessment which was listed on the original Schedule #21798 and reported by your office as refundable has been deleted from the original schedule by this office, and rescheduled, inasmuch as bureau records show that the overassessment resulted from a reallocation of the incomes of four affiliated companies and that as a further result of this adjustment additional taxes were assessed against the Franklin Gas Coal Company, the Randolph Coal Company, and the Smokeless Quemahoning Coal Company, on the commissioner's June, 1926, list, #4.

"The overassessment allowed to the Meyersdale Fuel Company should, therefore, be credited in the required amounts to the deficiencies assessed against the affiliated companies and any amounts paid by these companies in consequence of such assessment should be reported as refundable on Forms 844."

X. On July 9, 1927, the collector having complied with the above-mentioned instructions of the commissioner to

apply the overassessment against the tax determined to be due by the corporations included in the consolidated return, returned to the commissioner the supplemental Schedule #21798 mentioned in the commissioner's letter of July 6, together with the collector's schedules of refunds and credits, Forms 7776 and 7776–A.

The collector of internal revenue made appropriate entries in the account of Meyersdale Fuel Company for 1920, 1921, and 1922, showing that the overassessment of $96,038.23 had been applied as follows:

Company	Additional taxes of year against which credit was applied or refund made	Amount	Account No.	Credit or refund schedule
Franklin Gas Coal Co	1920	$81,789.45	June, 1926. Addl. 70C #4	21798
Smokeless Quemahoning Coal Co.	1920	2,362.80	June, 1926. Addl. 171C #4	21798
Randolph Coal Co	1920	6,383.95	June, 1926. Addl. 143C #4	21798
Randolph Coal Co	1921	1,105.43	June, 1926. Addl. 144C #4	21798
Meyersdale Fuel Co	1922	277.44	April, 1927. Addl. 25C #5	21798
	Refunds			
Meyersdale Fuel Co	1920	4,119.16		21798
Total		96,038.23		

After these entries had been made by the collector and reported to the commissioner, Treasury check dated September 30, 1927, for $5,657.89 made up of the refund of $4,119.16 shown above and accrued interest of $1,538.75 was issued in favor of the Meyersdale Fuel Company. This check, together with a certificate of overassessment No. 930519, Schedule 21798, showing an overassessment for 1920 of $96,038.23, hereinbefore referred to, and a copy of the commissioner's letter of August 19, 1926, hereinbefore set forth in Finding VIII, were sent to plaintiff and received by it December 28, 1927.

XI. March 16, 1928, the plaintiff by its attorney filed with the Commissioner of Internal Revenue a petition for reconsideration claiming that the crediting of an overassessment

of the Meyersdale Fuel Company of the consolidated return for 1920 against the tax of Franklin, Smokeless, and Randolph companies for that year was illegal and demanding that the action taken be reversed and that the excess of the tax paid on the consolidated return over the correct tax liability of the Meyersdale Fuel Company be refunded to it with interest.

On March 28, 1928, plaintiff filed another claim for refund for $96,638.56 on the grounds that the collector had erroneously applied the overassessment of the Meyersdale Fuel Company's tax liability for 1920 against the additional taxes of the Randolph, Smokeless, and Franklin companies. Upon consideration of the petition for reconsideration and the second claim for refund by the Income Tax Unit of the Bureau of Internal Revenue, that unit submitted the following memorandum to the deputy commissioner of accounts and collections, Bureau of Internal Revenue:

"Reference is made to an overassessment of income taxes in favor of the Meyersdale Fuel Company, Somerset, Pennsylvania, for the year 1920, in the amount of $96,038.23, reported on supplemental Schedule IT 21798 by the collector of internal revenue for the twenty-third district of Pennsylvania, as follows:

$81,789.45 credited to June, 1926, #4 list, #70-C (1920). Franklin Gas Coal Company.
2,362.80 credited to June, 1926, #4 list, #161-C (1920). Smokeless Quemahoning Coal Company.
6,383.95 credited to June, 1926, #4 list, #143-C (1920). Randolph Coal Company.
1,105.43 credited to June, 1926, #4 list, #144-C (1921). Randolph Coal Company.
277.44 credited to April, 1927, #5 list, #25 (1922). Meyersdale Fuel Company.
4,119.16 certified for refund.

96,038.23

"Treasury check for $5,657.89, in payment of the refund and accrued interest of $1,538.73, was issued September 30, 1927.

"The taxpayer protested the application of $91,641.63 of its overassessment to the deficiencies in tax against the above-mentioned companies, basing its contention on the bureau's ruling that the several companies were not affiliated and that this office was, in the absence of an agreement between the companies, involved, without authority to make the credits.

"An investigation made in connection with the taxpayer's petition has disclosed that the case was not adjusted in accordance with the ruling of the United States Board of Tax Appeals in the case of the Mather Paper Company, and that the greater portion of the overassessment represents an erroneous allowance, and the deficiencies in tax against the so-called affiliated companies were erroneously assessed in whole, with the exception of $5,439.35 of the tax against the Franklin Gas Coal Company.

" It is recommended that the collector be authorized to eliminate the credits totaling $91,641.63 against the Franklin Gas Coal, the Smokeless Quemahoning Coal Company, and the Randolph Coal Company, and instructed to withhold collection of the resultant outstanding taxes pending receipt of the overassessments to be allowed in favor of the several companies."

XII. On April 10, 1928, the Commissioner of Internal Revenue wrote plaintiff's counsel a letter as follows:

" Reference is made to your petition for reconsideration of the action taken by this office in adjusting the 1920 income-tax accounts of Meyersdale Fuel Company and associated companies, whereby $91,641.63 of an overassessment of $96,038.23 determined in favor of the taxpayer named was applied as a credit to additional taxes assessed against its so-called subsidiaries.

"It is your contention that the bureau, having ruled that the several companies were not affiliated, was without authority to make the credits referred to, in the absence of an agreement between the companies involved, and you demand the refund, with interest, of the amount credited.

" It appears from a review of the case made in connection with consideration of your petition that the overassessment above mentioned was erroneous. As decided by the Board of Tax Appeals in the appeal of Mather Paper Company the tax reported on the original return should have been assessed against the several companies, as provided in section 240 of the revenue act of 1918, on the basis of the net income properly assignable to each and credit should have been given for such amounts in the computation of deficiencies subsequently determined.

" Failure of the collector to comply with the provisions of section 240 is held by the board to be a mere ministerial error subject to be corrected at any time and it is now proposed to make such correction in this case.

" The tax reported on the consolidated return has accordingly been allocated to the various companies and their re-

spective liabilities will be offset by such allocated amounts as indicated below:

	Allocation of tax assessed	Correct tax liability	Overassessment	Deficiency
Meyersdale Fuel Co	$23, 365. 41	$13, 600. 80	$9, 764. 61	----------
Franklin Gas Coal Co	76, 840. 34	82, 279. 69	----------	$5, 439. 35
Smokeless Quemahoning Coal Co	2, 852. 80	2, 852. 80	----------	----------
Randolph Coal Co	6, 580. 48	6, 580. 48	----------	----------
Total	109, 639. 03	105, 313. 77	----------	----------

"In effecting this readjustment the credits objected to in your petition will be reversed and the accounts will be corrected to reflect the proper overassessment in favor of the Meyersdale Fuel Company and such deficiencies against the other companies as will result from the reversal of the credits."

April 14, 1928, the deputy commissioner of accounts and collections of the Bureau of Internal Revenue instructed the collector as follows:

"There is inclosed a copy of a memorandum dated April 18, 1928, from the Income Tax Unit of the bureau relative to an overassessment in favor of the Meyersdale Fuel Company, Somerset, Pennsylvania, for the year 1920, in the amount of $96,038.23, Schedule IT A-21798.

"The Income Tax Unit states that the taxpayer protested the application of $91,641.63 of its overassessment to the deficiencies in tax against the companies mentioned in the memorandum from the Income Tax Unit, basing its contention on the bureau's ruling that the several companies were not affiliated and, in the absence of an agreement between the companies involved, was without authority to make the credits.

"An investigation made in connection with the taxpayer's petition discloses that the case was not adjusted in accordance with the ruling of the United States Board of Tax Appeals, in the case of the Mather Paper Company, and that the greater portion of the overassessment represented an erroneous allowance and the deficiencies in tax against the so-called affiliated companies were erroneously assessed in whole, with the exception of $5,439.35 of the tax against the Franklin Gas Coal Company. It, therefore, will be necessary for you to reverse the credits totaling $91,641.63 against the Franklin Gas Coal Company, the Smokeless Quemahoning Coal Company, and the Randolph Coal Company, and to withhold collection of the resultant outstanding taxes

pending receipt of the overassessments to be allowed in favor of the several companies.

"Your accounts should be adjusted by debiting account 6a and crediting account 18. Please attach a copy of this letter to the Form 820 on which these transactions are reflected. An appropriate notation should be made on your copy of the certificate of overassessment and the schedule.

"The credit of $277.44 and the refund of $4,119.16 will be allowed to stand and will be considered in the computation of a further overassessment which will be allowed in favor of the Meyersdale Fuel Company in connection with the Mather Paper Company decision."

On April 17, 1928, the deputy commissioner wrote the collector as follows:

"Reference is made to an overassessment of income taxes in favor of the Meyersdale Fuel Company, Somerset, Pennsylvania, for the year 1920, in the amount of $96,038.23, reported by your office on supplemental Schedule IT–21798, as follows:

$81,789.45 credited to June, 1926, #4 list, #70 (1920).
Franklin Gas Coal Company.
2,362.80 credited to June, 1926, #4 list, #161 (1920).
Smokeless Quemahoning Coal Company.
6,383.95 credited to June, 1926, #4 list, #143 (1920).
Randolph Coal Company.
1,105.43 credited to June, 1926, #4 list, #144 (1921).
Randolph Coal Company.
277.44 credited to April, 1927, #5 list, #25 (1922).
Meyersdale Fuel Company.
4,119.16 certified for refund.

96,038.23

"An investigation in connection with the taxpayer's protest against the application of $91,641.63 of its overassessment to the deficiencies in tax against the above-mentioned companies, disclosed that the case had not been adjusted in accordance with the ruling of the United States Board of Tax Appeals in the case of the Mather Paper Company and that the greater portion of the overassessment represents an erroneous allowance and the deficiencies in tax against the so-called affiliated companies for 1920, were erroneously assessed in whole, with the exception of $5,439.35 of the tax against the Franklin Gas Coal Company.

"In a communication from the accounts and collections unit dated April 14, 1928, you were authorized to eliminate the credits totaling $91,641.63 and advised that overassessments were to be allowed in favor of the several companies for 1920.

Reporter's Statement of the Case

"The overassessments are listed on Schedule IT–29648, which was mailed to your office April 16, 1928.

"Inasmuch as the additional tax for 1921 was correctly assessed against the Randolph Coal Company and no certificate will be issued for that year, the $1,105.43 outstanding on the June, 1926, #4 list, #144, as a result of eliminating the credit, should be collected."

XIII. The collector of internal revenue, pursuant to the instructions from the commissioner's office and in conformity with the letter of the commissioner of April 10, 1928, to counsel for the plaintiff, hereinbefore mentioned, changed the entries on his books with reference to the total tax of $109,639.03 shown on the original consolidated return and included on the original March, 1921, assessment list, #401322, in the name of the Meyersdale Fuel Company, in order to show a distribution of this total tax to the plaintiff, the Franklin, Smokeless, and Randolph companies, on the basis of net income properly assignable to each; and after such distribution the collector's records showed the following:

Meyersdale Fuel Company, Somerset, Pennsylvania, No. 401322–A	$23, 365. 41
Franklin Gas Coal Company, Somerset, Pennsylvania, No. 401322–B	76, 840. 34
Smokeless Quemahoning Coal Company, Somerset, Pennsylvania, No. 401322–C	2, 852. 80
Randolph Coal Company, Somerset, Pennsylvania, No. 401322–D	6, 580. 48

In the final decision of the commissioner, to the extent of the tax liability of the several companies, the original assessment of $109,639.03 was not canceled or abated. No new or further assessment against any of the companies was made by the commissioner and no new or further assessment list or lists were ever signed by the commissioner in respect of any portion of the original assessment of $109,639.03. The pages of the collector's record upon which he made a distribution and appropriate entries in order to allocate the total tax shown on the consolidated return and on the assessment list in the name of plaintiff to the several companies, as above set forth, were headed "Assessment list" and were on Form 23–A, but were not signed by the commissioner or

by anyone else. When the Commissioner of Internal Revenue makes an assessment of taxes he signs a list entitled "Commissioner's assessment list" on Form 23 C-1. No such list was signed by the commissioner with respect to the tax of any of the companies hereinbefore mentioned subsequent to the assessments made by him against the Franklin, Smokeless, and Randolph companies in June, 1926.

XIV. When the collector had made appropriate entries in his records, as last above mentioned, the commissioner on June 15, 1928, issued a second certificate of overassessment, #930519, Schedule 29648, to the plaintiff showing an overassessment for 1920 in the amount of $5,368.01 and interest thereon of $1,739.01. There was attached to this certificate of overassessment Treasury check payable to the plaintiff for these two amounts totaling $7,107.02.

XV. June 15, 1928, the commissioner issued to the Smokeless Company a certificate of overassessment, #1096526, Schedule 29648, showing an overassessment for 1920 of $2,862.80. This was the assessment made by the commissioner against this company in June, 1926. This certificate of overassessment showed a partial abatement of this amount of $2,362.80 and a refund of the balance of $500 with interest, or $33.04. This refund came about by reason of the fact that before the final credits made by the collector, as last above set forth, certain collections had been made from this company. There was sent to the plaintiff with this certificate of overassessment Treasury check payable to it in the amount of $533.04.

XVI. May 16, 1928, the commissioner issued to the Randolph Coal Company a certificate of overassessment, #1096524, Schedule 29648, showing an overassessment for 1920 of $6,683.95. This overassessment resulted from the assessment made against this company in June, 1926, hereinbefore referred to. The certificate showed that $6,383.95 of the overassessment was abated and that $300 was credited to a tax due by this corporation for 1921.

XVII. May 16, 1928, the commissioner issued to the Franklin Gas Coal Company a certificate of overassessment, #1096525, Schedule 29648, showing an overassessment for 1920 of $76,841.31. This overassessment arose by reason of

the assessment in June, 1926, hereinbefore referred to. The certificate of overassessment showed that this entire amount was abated.

The court decided that plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff brings this suit to recover $76,551.06 alleged to represent the balance of an overpayment of income and profits tax due it for 1920 resulting from the filing of a consolidated return for that year for itself and three other corporations known as the Franklin Gas Coal Company, the Smokeless Quemahoning Coal Company, and the Randolph Coal Company. The consolidated return was filed in plaintiff's name and the total tax shown thereon upon the consolidated net income of all of the corporations amounting to $109,-639.03 was paid in four installments to the collector of internal revenue by plaintiff with its checks. Before plaintiff paid these amounts, however, it charged the other three corporations whose income was included in said return with their proportionate part of the total tax in accordance with their net income and they each paid to the plaintiff the amounts so charged on the dates set forth in the findings. The amount of the total tax paid by plaintiff representing its proportion of the tax due upon the consolidated net income shown in the return, and for which it was not reimbursed by the other corporations, was $14,439.47.

After the consolidated return had been filed the collector of internal revenue according to his usual custom entered the total tax shown on the return on an assessment list of March, 1921, in the name of plaintiff whose name only appeared at the head of the consolidated return. In due course the list was duly signed by the Commissioner of Internal Revenue. Subsequently the commissioner audited the return and ruled that the corporations were not affiliated within the meaning of section 240 of the revenue act of 1918 and computed the tax of plaintiff and the other corporations separately upon their individual incomes. The correct tax lia-

bility of plaintiff was determined to be $13,600.80 and there is no dispute in this proceeding about that.

The commissioner first made additional assessments against the other corporations in June, 1926, in respect of their tax for 1920 and according to instructions the collector satisfied the tax so determined and assessed against these three corporations by applying thereto a proportion of the tax shown and paid on the consolidated return. A certificate of overassessment was first issued for $96,038.23, being the difference between the plaintiff's correct tax liability and the total tax shown on the consolidated return. A small proportion of this tax paid on the consolidated return was also credited against additional assessments against the Randolph Coal Company for 1921 and the plaintiff for 1922. After making these credits and subtracting the correct tax of plaintiff of $13,600.80 from the remainder of the total tax paid on the consolidated return there was left the amount of $4,119.16 paid on such return. The last-mentioned amount was refunded to plaintiff with interest by Treasury check dated September 30, 1927. The plaintiff's counsel protested this action of the commissioner claiming that, in the absence of an agreement among the corporations involved, the credits were illegal and demanded that the difference between the total tax of $109,639.03 paid on the consolidated return and the plaintiff's correct tax liability of $13,600.80 computed on a separate basis, or $96,038.23, be refunded to the plaintiff with interest as an overpayment by it for 1920.

The commissioner might well have denied this protest of plaintiff of illegality because in our opinion the plaintiff, under the facts, was not entitled to a refund of more than $838.65, being the difference between the tax of $14,439.47 paid by it on the consolidated return out of its own funds without reimbursement from the other corporations and its correct tax liability of $13,600.80. The other corporations might have had some cause to make objections as to amounts but we need not consider this matter here. After the filing of plaintiff's protest of illegality and request for reconsideration, the Income Tax Unit of the Bureau of Internal Revenue concluded that under the decision of the United States Board of Tax Appeals in *Mather Paper Co.*, 3 B. T.

A. 1, the separate tax liability of the corporations included in the erroneous consolidated return, with the exception of a certain amount against the Franklin Company, should be satisfied on the collector's books out of the total tax paid on the consolidated return without further assessment and submitted a memorandum to that effect to the Accounts and Collections Unit of the Bureau of Internal Revenue. As a result the Commissioner of Internal Revenue in a letter of April 10, 1928, to plaintiff's counsel, set out in Finding XII, advised that the previous credits should be reversed and that the total tax paid on the consolidated return should be allocated to the tax due by the corporations which had been included in the consolidated return in proportion to the net income assignable to each in conformity with the decision of the Board of Tax Appeals in *Mather Paper Co.*, *supra.* On April 14, 1928, the deputy commissioner of accounts and collections instructed the collector of internal revenue that the previous certificate of overassessment of $96,038.32 and the additional assessments in June, 1926, were erroneous and to reverse the credits previously made and withhold further action by the bureau under the decision of the Board of Tax Appeals in *Mather Paper Company*, *supra.* The collector did so. Subsequently, in May and June, 1928, certificates of overassessment were issued as set forth in Findings XV, XVI, and XVII. Thereupon the collector of internal revenue made appropriate entries in his records showing the payment and satisfaction without further assessment of the tax liability of the several companies, with the exception of a deficiency of $5,439.35 against the Franklin Company finally determined by the commissioner, out of the tax of $109,639.03 originally collected on the consolidated return which had previously been assessed in its entirety against the plaintiff as the parent corporation. By this action the plaintiff was given a further refund of $5,316.01 with interest.

Upon these facts we are of opinion that plaintiff is not entitled to recover. It has no just cause to complain concerning that which the commissioner did, and we need not enter into a discussion whether the other companies might have had any valid objection. They are not parties to this

suit. The commissioner followed the decision of the Board of Tax Appeals in *Mather Paper Co.*, *supra*, and we find no reason for holding that the decision of the board in that case was wrong.

Plaintiff's contention, as summarized in its reply brief, is as follows:

"The plaintiff does not assume that a certificate of overassessment in itself justifies a refund, but in this case the plaintiff was assessed and paid $109,639.03 for 1920. It is admitted by the defendant that the plaintiff's correct tax liability for 1920 is $13,600.80. The Meyersdale Fuel Company therefore was overassessed and overpaid for 1920 in the amount of $96,038.23. The Commissioner of Internal Revenue has already made refunds of $4,119.16 and $5,368.01.

"The plaintiff is still entitled to a further refund of $86,551.06 with legal interest. There is no question but that the Meyersdale Fuel Company paid to the Commissioner of Internal Revenue during 1921 by its own checks and from its own funds $109,639.03 for the assessment made for the year 1920. The fundamental error of the defendant is in assuming that the Commissioner of Internal Revenue can take money paid to him by one corporation and apply it in payment of the taxes of other corporations. The commissioner's so-called reallocation in June, 1928, is nothing more than an assessment against each of the four individual companies made at that time, and taxes paid by the plaintiff in 1921 can not be applied as a credit to offset such assessments made against the Franklin, Smokeless, and Randolph companies."

Plaintiff also contends in support of its claim for judgment that the commissioner made assessments against the Franklin, Smokeless, and Randolph companies in May and June, 1928, which he was not permitted to do under the statute of limitation and waiver, and that, therefore, the application of a portion of the total tax paid on the consolidated return in satisfaction of such assessments was barred and was illegal. Assuming this claim were true, which we think is not the case, it would not benefit this plaintiff. Plaintiff's claim is predicated upon a technicality and a too literal interpretation of the provisions of section 284 (a) of the revenue act of 1926 with reference to overpayments, refunds, and credits. There was no agreement

among the corporations that plaintiff would assume the tax of the other corporations or that their tax should be assessed against plaintiff. However, the facts establish that there was an agreement among the several corporations that the tax shown on the consolidated return of the corporations included in such consolidated return was to be paid through the plaintiff as the parent corporation. Each subsidiary corporation paid to plaintiff its proportion of the tax. In substance, so far as concerns the total tax paid on the consolidated return in question, with the exception of $14,-439.47, the plaintiff was not "the taxpayer" within the meaning of the statute. It merely acted as the medium through which the other corporations paid the amounts which they believed to be due upon their net income. This is clearly established by the charges which plaintiff made on its books against the other corporations of their proportion of the tax before it made payments to the collector, and the payment by such other corporations to the plaintiff in each instance except one payment made by the Franklin Gas Coal Company on March 28, of the amounts so charged before the plaintiff's checks reached the collector of internal revenue. Even if all of the tax shown on the consolidated return had been remitted by the plaintiff to the collector before it received the actual cash from the other corporations in reimbursement, this was done for the convenience of all and plaintiff would have been in the position of having advanced money to the other corporations to the extent of their liability. The provisions of section 252 of the revenue act of 1918 and section 284 (a) of the revenue act of 1926 must be construed and applied in the light of the situations arising in connection with the filing of consolidated returns under the provisions of section 240 of the revenue act of 1918. When the facts in this case are viewed in the light of these provisions, it is clear that plaintiff is not entitled to recover. The commissioner had already refunded to plaintiff amounts in excess of its tax which it paid out of its own funds as a "taxpayer," and even if the commissioner had retained money belonging to the other corporations on assessments

Opinion of the Court

against such corporations, this plaintiff is not entitled to recover these amounts. Taxes may be and often are collected without assessment and this is recognized by sections 273 of the revenue acts of 1924 and 1926, but, in such a case, the tax if legally due can not be recovered merely because it had not been formally assessed. The commissioner did not make a new assessment in May or June, 1928, against the Franklin, Smokeless, and Randolph companies. So far as these corporations were concerned, the tax due by them had been collected without assessment specifically against them. The action of the commissioner as disclosed by his letter of April 10, 1928, in applying the amount shown, assessed, and paid in the name of plaintiff on the consolidated return in excess of plaintiff's tax liability in satisfaction of the tax of the other three corporations computed on a separate basis and the issuance of certificates of overassessments, was not a new or further assessment but was a reversal of a former credit which he had made and the making of a new distribution of the total tax paid, to the tax liability of the other companies out of monies paid by them as their tax through the plaintiff.

This last distribution made by the collector in conformity with the commissioner's instructions only slightly changed the amounts which had theretofore been allocated to the several companies. No assessment list was signed by the commissioner. The entry by the collector of the names of the Franklin, Smokeless, and Randolph companies upon certain pages of his records, designated as Treasury Department Form 23A, upon which pages opposite the name of the companies he made certain entries and notations under the headings "Old Balance," "Date," "Debit," "Credit," "New Balance," "Remarks," did not constitute an assessment by the commissioner, even though such pages were headed "Assessment list." These pages are uniformly used by the collector to show a proper record of the accounts of taxpayers. When the commissioner makes an assessment he signs an entirely different document headed "Commissioner's assessment list" designated Treasury Department, Form 23 C-1. There appears upon such list statements

nowhere contained in the list used by the collector upon which to make his entries.

The plaintiff is not entitled to recover. The petition must therefore be dismissed and it is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WHALEY, *Judge*, did not hear this case and took no part in the decision thereof.

CASES DECIDED

IN

THE COURT OF CLAIMS

JUNE 1, 1930, TO NOVEMBER 3, 1930, INCLUSIVE

IN WHICH JUDGMENTS WERE RENDERED BUT NO OPINIONS DELIVERED

No. C-1071. JUNE 2, 1930

St. Louis-San Francisco Ry. Co.

Transportation of passengers—equalized fares, act of October 6, 1917, $3,300.15.

Nos. D-508 AND D-508 (2). JUNE 16, 1930

Wheeling Mold & Foundry Co.

Contract for gun-mount materials, $2,811.86.

No. E-602. JUNE 16, 1930

James R. Tindle.

Taking of land, $7,250, with interest.

No. H-350. JUNE 16, 1930

Blueblaze Motor Specialties Corp.

Refund of excise tax; automobile parts, $7,568.49, with interest.

No. J-32. JUNE 16, 1930

Lewis L. Gover.

Allowances on account of dependent parent, $1,322.46.

No. J–48. JUNE 16, 1930

Anna Dawson Howard.

Claim under war risk insurance act. Dismissed.

No. J–49. JUNE 16, 1930

Mattie Foley Howard.

Claim under war risk insurance act. Dismissed.

No. J–66. JUNE 16, 1930

Advance Automobile Accessories Corp.

Refund of excise tax; automobile parts, $6,142.09, with interest.

No. J–67. JUNE 16, 1930

White Brass Castings Co.

Refund of excise tax; automobile parts, $4,144.69, with interest.

No. K–144. JUNE 16, 1930

Charles M. Huntington.

Allowances on account of dependent parent, $1,850.47.

No. K–320. JUNE 16, 1930

Robert S. Bertschy.

Allowances on account of dependents, $2,248.20.

No. K–466. OCTOBER 13, 1930

American Can Co.

Articles purchased by Navy Department. Dismissed.

No. J–408. OCTOBER 20, 1930

Mittie Brackett.

Civil service bonus. Dismissed.

No. K–190. OCTOBER 20, 1930

Harold M. Bemis.

Allowances on account of dependent parent. Dismissed.

No. K–346. OCTOBER 20, 1930

Lawrence D. Bell.

Royalties for use of patent on flying machine. Dismissed.

No. K-380. OCTOBER 20, 1930

Scott Wood.

Refund of retired pay, Army. Dismissed.

No. E-402. NOVEMBER 3, 1930

Westclox Co. (formerly Western Clock Co.).

Refund of income and profits tax; deduction for exhaustion or depreciation of patents acquired prior to March 1, 1913, $50,267.14, with interest. (See 68 C. Cls. 758.)

No. H-38. NOVEMBER 3, 1930

Sperry Gyroscope Co.

Infringement of letters patent, fire-control apparatus. Dismissed.

No. H-112. NOVEMBER 3, 1930

Cora G. Clarkson.

Taking of land, $2,315, with interest.

No. H-261. NOVEMBER 3, 1930

Charles G. Mettler.

Additional compensation, professor, West Point, $770.30. Judgment under special jurisdictional act of June 28, 1930. (See 66 C. Cls. 742.)

No. K-104. NOVEMBER 3, 1930

International Great Northern R. R. Co.

Refund on shipment of petroleum. Dismissed.

No. K-189. NOVEMBER 3, 1930

Edmund B. Keating.

Rental and subsistence allowances, dependent mother, Navy, $1,514.33.

No. L-159. NOVEMBER 3, 1930

Russell D. Bell.

Rental and subsistence allowances, dependent mother, Navy. Dismissed.

CASES DISMISSED BY THE COURT OF CLAIMS PERTAINING TO REFUND OF TAXES

ON JUNE 2, 1930

J-214. Swift & Co.
J-571. M. Seller & Co.
J-609. Clarence C. Reed, admr.
K-134. D. M. Dillon Steam Boiler Works.
K-278. May N. Brown, executrix.
K-447. Wolf Wile Co.
L-9. Rock Island Brewing Co.

ON JUNE 4, 1930

J-687. William G. Burt et al., trustees, etc.

ON JUNE 16, 1930

F-93. United Profit Sharing Corp.[1]
J-115. Rochester Woven Belting Corp.
J-116. Hinsdale Mfg. Co.
J-442. William E. Troutman et al.
J-448. Adams Mining Co. et al.
J-463. Carnegie Natural Gas Co.
J-464. Carnegie Steel Co.
J-535. United States Steel Corp.
J-590. Cecelia Hesselbrock, executrix.
J-681. United States Steel Corp.
K-485. City Bank Farmers' Trust Co.
K-527. United States Steel Corp.
K-529. United States Steel Corp.
L-77. Ralco Oil Co.
L-86. Orbin Buhler, executor.
L-90. Citizens Bldg. & Loan Co.

ON OCTOBER 13, 1930

J-686. Hazeltine & Perkins Drug Co.
K-147. Illinois Terminal Co.

ON OCTOBER 20, 1930

H-16. C. B. Fox.
H-61. Worden-Allen Co.
H-212. Hugh E. Whitney.
H-302. Tarsco Corporation.
H-361. James A. Burden et al.
H-464. Funch, Edye & Co.
H-493. American Thread Co.
J-85. Associated Operating Co.
J-145. Harrisburg Pipe & Pipe Bending Co.
J-417. Untermeyer, Robbins & Co.
J-611. Brown Lipe Gear Co.
J-637. H. L. Caplan & Co.
J-652. Stone Straw Co.
J-658. Oliver Typewriter Co.
K-18. George R. Blakeslee, trustee.
K-36. Alfred S. Bourne.
K-142. Burrwood Corporation.
K-143. Burrwood Corporation.
K-168. New Pittsburgh Coal Co.
K-196. Sara Holmes Grant, executrix.
K-315. Welwood Silk Mills et al.
K-343. Smith P. Burton, jr., et al.
K-425. Swift & Co.
K-492. Floete Land & Loan Co.
K-525. W. W. Mooney & Sons.
K-537. Douglas Fairbanks.
L-10. Bray-Robinson Clothing Co.
L-175. Jonathan Warner.
L-184. Henrietta Morris Perry et al.

ON NOVEMBER 3, 1930

F-356. Java China Japan Lijn.
F-404. Woodward & Lothrop.
H-81. J. Laurence Sprunt et al.
H-82. Alexander Sprunt.
H-83. J. Laurence Sprunt et al.
H-84. J. Laurence Sprunt.

[1] Certiorari applied for.

H-85. Walter P. Sprunt.
H-86. William H. Sprunt.
H-167. Chicago Lumber & Coal Co.
J-122. Union Cotton Mfg. Co.
J-237. Tilyou Realty Co.
J-684. A. Harvey's Sons Mfg. Co.
K-62. National Casket Co.
K-141. Ohio Piston Co.
K-287. Whiting Leather & Belting Co.
L-20. George Lewis.
L-21. Joseph Z. Muir.
L-344. D. De Stefano Co.

CASES DISMISSED BY THE COURT OF CLAIMS ON THE AUTHORITY OF BEW v. UNITED STATES, 68 C. CLS. 462

ON JUNE 2, 1930

K-203. William B. Collier.
K-204. W. W. Scott.
K-205. Nelson Smith.
K-206. J. J. Peake, jr.
K-207. Robert E. Morris.
K-208. S. S. Harvey.
K-209. Milton D. Owens.
K-210. Roy B. Dawson.
K-211. G. A. Massenburg.
K-212. W. A. Davis.
K-213. William Baulch.
K-214. R. B. Holland.
K-215. D. D. Bullock.
K-216. M. B. Edmunds.
K-217. Clemont P. Evans.
K-218. R. C. Henley, 2nd.
K-219. Fred W. Hope.
K-220. Francis B. Thomas.
K-221. P. T. Woodfin.
K-222. W. A. Wood, jr.
K-223. Wilkie B. Stell.
K-224. Laurence L. Jones.
K-225. W. A. Wood, sr.
K-226. W. H. Warren.
K-227. Elias E. Guy.
K-228. Arthur B. Topping.
K-229. Malcolm T. Brown.
K-230. Cecil B. Guy.
K-231. James R. Peake.
K-232. William D. Reilly.
K-233. W. Shepard Foster.
K-234. W. L. Hudgins.
K-235. Fred D. Cock.
K-236. Robert H. Dozier.
K-237. Robert C. Francis, jr.
K-238. William R. Boutwell.
K-239. C. C. Waterfield.
K-240. John D. Watson.
K-241. James G. Peak.
K-242. Carroll B. Foster.
K-243. Hugh Foster.
K-244. L. J. Stallings.
K-245. D. L. Scott.
K-246. Edward H. Scott.
K-247. Elmer Wing.
K-248. R. C. Francis, executor.

ABSTRACT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

WHEELER LUMBER BRIDGE & SUPPLY CO. OF DES MOINES, IOWA, v. UNITED STATES

[281 U. S. 572]

In answer to a question certified by the court below in suit by plaintiff to recover the amount of a tax on rail transportation service which it paid under protest, the Supreme Court decided:

1. A certification by the Court of Claims under § 3 (a) of the act of February 13, 1925, can not be entertained if the question certified embraces the whole case, because to accept it and proceed to a determination thereof would be an exercise of original jurisdiction by this court contrary to the Constitution, and because the statute permits a certification only of definite and distinct questions of law.
2. That a certification from a court of first instance, restricted to definite and distinct questions of law, invokes appellate action, is settled by early and long continued usage amounting to a practical construction of the constitutional provision defining the jurisdiction of this court.
3. The certification of a definite question of law is not rendered objectionable merely because the answer may be decisive of the case.
4. The importance or controlling character of the question certified, if it be a question of law and suitably specific, affords no ground for declining to accept the certification.
5. Under the revenue acts of 1917 and 1918, which imposed a tax on transportation of freight payable by the person paying for the service, the exemption [§ 502, act of 1917; § 500 (h), act of 1918], allowed in case of transportation rendered to a State is to be construed as extending to her counties.

Syllabus

6. Where a vendor, who had engaged to sell and deliver lumber needed for public bridges to a county at a designated point in the county f. o. b. at a stated price, shipped the lumber by rail to that point preparatory to there effecting the required delivery and forwarded the bills of lading to the county, and the latter, conformably to the vendor's intention, surrendered the bills of lading to the carrier, paid its transportation charges, received the lumber from it, deducted from the f. o. b. price at destination the transportation charges paid to the carrier, and remitted the balance to the vendor—the transportation of the lumber to the place of delivery was not a service rendered to the county (State) within the meaning of the exempting provisions of § 502 of the revenue act of 1917 and § 500 (h) of the revenue act of 1918.
7. Although the transportation in this case was with a view to a definite sale to the county, the transportation was not in fact a part of the sale, but preliminary to it and wholly the vendor's affair; therefore the tax on the transportation can not be regarded as a tax or burden on the sale, and *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, is inapplicable.

Mr. JUSTICE VAN DEVANTER delivered the opinion of the Supreme Court May 26, 1930.

UNIVERSAL BATTERY CO. v. UNITED STATES

VESTA BATTERY CORP. v. SAME

BASSICK MANUFACTURING CO. v. SAME

F. W. STEWART MFG. CORP. v. SAME

GEMCO MANUFACTURING CO. v. SAME

[66 C. Cls. 748; 67 id. 711; 68 id. 366; 67 id. 275; Id. 287; 281 U. S. 580]

Judgments were rendered in favor of the United States in the court below. Upon certiorari the judgments in *Universal Battery Co.* v. *United States*, 66 C. Cls. 748, and *Bassick Mfg. Co.* v. *United States*, 68 id. 366, were *reversed*, and in the other cases *affirmed*, the Supreme Court deciding:

1. The construction of the terms "parts" and "accessories" adopted in administrative regulations issued under § 900 of the revenue acts of 1918 and 1921 (which imposed a manufacturers' excise

Syllabus

tax upon the sale of automobile parts and accessories), whereby articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted, is reasonable, and, having been adhered to in the Internal Revenue Bureau for about ten years, should be upheld.

2. Applying that construction to sales of specific articles, it is *held* that storage batteries, of a type specially suitable for use on automobiles as replacements, and not adapted to any other primary purpose or use, and replacement parts for speedometers and bumpers, were properly regarded as parts or accessories; while storage batteries, of a type alleged to be not primarily adapted for use on automobiles, and gascolators, a device alleged to be sold for general use on various types of internal combustion engines as well as automobiles, could not properly be regarded as parts or accessories unless there are affirmative findings on the issue of primary adaptation.

Mr. JUSTICE VAN DEVANTER delivered the opinion of the Supreme Court May 26, 1930.

GOTHAM CAN CO. v. UNITED STATES

[68 C. Cls. 749; 281 U. S. 706]

Petition for writ of certiorari was *dismissed* by the Supreme Court June 2, 1930.

GREENFIELD TAP & DIE CORPORATION v. UNITED STATES

[68 C. Cls. 61; 281 U. S. 737]

Petition for writ of certiorari *denied* by the Supreme Court April 14, 1930.

UTICA KNITTING CO. v. UNITED STATES

[68 C. Cls. 77; 281 U. S. 739]

Petition for writ of certiorari *denied* by the Supreme Court April 21, 1930.

DU PUY v. UNITED STATES

SAME v. SAME

[67 C. Cls. 348; 68 id. 574; Id. 785; 281 U. S. 739]

Petitions for writs of certiorari were *denied* by the Supreme Court April 21, 1930.

WARREN, EXECUTRIX, v. UNITED STATES

[68 C. Cls. 634; 281 U. S. 739]

Petition for writ of certiorari was *denied* by the Supreme Court April 21, 1930.

BEW v. UNITED STATES

[68 C. Cls. 462; 281 U. S. 750]

Petition for writ of certiorari was *denied* by the Supreme Court May 5, 1930.

ESCHER, ADMINISTRATOR, ET AL., v. UNITED STATES

[68 C. Cls. 473; 281 U. S. 752]

Petition for writ of certiorari was *denied* by the Supreme Court May 5, 1930.

NEWMAN, SAUNDERS & CO., INC., v. UNITED STATES

[68 C. Cls. 641; 281 U. S. 760]

Petition for writ of certiorari was *denied* by the Supreme Court May 26, 1930.

AUTOQUIP MFG. CO. v. UNITED STATES

[68 C. Cls. 362; 281 U. S. 764]

Petition for writ of certiorari was *denied* by the Supreme Court June 2, 1930.



INDEX DIGEST

CONTRACTS.

I. Plaintiff entered into an agreement with the United States Shipping Board to purchase from the board two steel vessels, the plaintiff to have possession under an agency and operating arrangement until the sale was consummated, the sale to be made under the terms of a standard sales policy. Thereafter, and before the sale was made, the plaintiff asked and was granted a modification of the terms of the standard sales policy. Finding itself unable to carry out the terms of sale, as modified, plaintiff asked to be relieved from the contract to purchase, offering to return the vessels under certain conditions, which were not accepted. The vessels were returned without further agreement and the board refused to return to plaintiff deposits made in accord with the contract for purchase, retaining them as liquidated damages. The terms of the contract and the record reviewed, and *held* to preclude recovery of the deposits so retained. *Cummins & Co.*, 1.

II. Liquidated damages; penalty. *Id.*

III. Where an agreement to purchase is breached, and deposits made thereunder are forfeited as liquidated damages, the retention of the deposits without any attempt to dispose of the property in a reasonable time, is an indication that the vendor relinquished any claim to the difference between the purchase price and the market value at time of breach. *Id.*

IV. Where the Emergency Fleet Corporation accepted a bid obligating the purchaser of certain sailing vessels to pay a stated price and in addition to pay for all fittings, "whether on the hulls, in the yards, or elsewhere at the inventory appraised price," and the cost of installing the same on the hulls, the term "fittings" may not be extended to include items other than those essential to bring the hull to a bare-boat status. *Id.*

PATENTS.

I. Letters Patent No. 1018769, issued to plaintiff as assignee of Midgley, on improvement in wave meters for measuring the wave length or frequency of oscillations such as are utilized in wireless telegraphy and telephony, which employs a unipolar connection, i. e., one wire or metallic connection from one terminal of the detector to the oscillating circuit, the other being left free, the object of such form of connection being to draw a minimum part of the energy from the oscillating circuit and thus leave the same capable of sharpest and most accurate resonance or tuning, *held* valid as to claims 4 and 5 thereof. Infringement conceded. *Firth*, 132.

II. Where in a suit for infringement of patent the issue of novelty is not made dependent upon the result of the invention, but upon the obtaining of the same results in preexisting devices upon a similar scientific basis, patents already in the art must be in part reconstructed from knowledge imparted by the challenged patent in order to settle the question of anticipation. *Id.*

III. Where the validity of a patent is in issue, the inability of the Patent Office examiner unaided to satisfy himself that the device in question would work is evidence that its operativeness would not be obvious to a mechanic skilled in the particular art. *Id.*

IV. Claim No. 7 of the Ericsson patent on antiexplosive and noninflammable gasoline tanks, Letters Patent No. 1381175, granted June 14, 1921, *held* anticipated by prior art and invalid. *Ericsson*, 401.

V. Where a claim in an application for patent, in describing the materials comprising the structure, uses a term which the disclosed construction shows is incorrect, the correct term will be substituted. *Id.*

PAY.

I. The act of August 24, 1912, did not authorize the deduction from the salary or compensation of employees of the Panama Canal, who were also retired enlisted men of the Navy, their retired pay as such enlisted men, and the acts of May 31, 1924, and of March 12, 1928, do not have the effect of a new promise to pay such a deduction,

TAXES—Continued.

Mills v. *United States*, 68 C. Cls. 539. *Warren Tool Co.*, 283.

XV. Where the Commissioner of Internal Revenue approved a schedule of refunds before the revenue act of 1926 went into effect, sent to him by a collector, but the refund in question was not paid by the disbursing clerk until after the act went into effect, section 1116, restricting interest to the first date on which the commissioner signs the schedule of overassessments, applies, in view of paragraph (c) making the section "applicable to any refund paid, and to any credit taken, on or after the date of the enactment of this Act, even though such refund or credit was allowed prior to such date." *Hind*, 288.

XVI. The allowance to a taxpayer of interest on a refund is a matter of grace with the sovereign, and except as given by Congress the taxpayer has no right thereto which can not be withdrawn or modified at any time. *Id.*

XVII. Where a company, having good will of value, was forced out of business on account of prohibition legislation, the thing it lost was the privilege of carrying on the business, and was not the good will, and the value thereof was not deductible from gross income for loss or obsolescence. *Seneca Hotel Co.*, 316.

XVIII. Under the revenue acts, where a taxpayer sells original shares of stock together with shares substantially of the same character or preference that have been issued to him as dividend thereon, gain measured by the difference between the cost of the original shares and the sale price of the entire issue is taxable as income. See *Chapman* v. *United States*, 63 C. Cls. 106; 275 U. S. 524. This rule is not affected by the fact that the statute attempting to tax the stock dividend as income at the time it was received was held invalid. *Beckers*, 319.

XIX. Where there has been a timely assessment, and collection is made within six years thereafter and subsequent to enactment of the revenue act of 1926, section 278 (d) thereof permits collection notwithstanding the same is made after the expiration of the period prescribed in duly executed waivers. *Northwestern Barb Wire Co.*, 329.

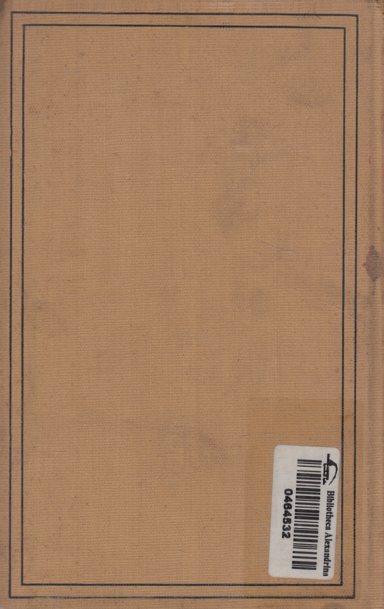
XX. Where the predominant purposes of a club are educational and the advancement of its members in science, literature, and art, and its main activities are conducted with the view of accomplishing such purposes, and its social features are merely incidental thereto, its membership dues are not taxable under sec. 801, revenue act.

○








Bibliotheca Alexandrina
0464532